Supreme Court, U. S.
FILED
FEB 1 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-434

WILLIAM G. MILLIKEN, *et al.*,
Petitioners,

vs.

RONALD G. BRADLEY, *et al.*
Respondents.

No. 73-435

ALLEN PARK PUBLIC SCHOOLS, *et al.*,
Petitioners,

vs.

RONALD G. BRADLEY, *et al.*
Respondents.

No. 73-436

THE GROSSE POINTE PUBLIC SCHOOL SYSTEM, *et al.*,
Petitioners,

vs.

RONALD G. BRADLEY, *et al.*
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

NATHANIEL R. JONES
1790 Broadway
New York, New York 10019

LOUIS R. LUCAS
WILLIAM E. CALDWELL
525 Commerce Title Bldg.
Memphis, Tennessee 38103

PAUL R. DIMOND
210 East Huron Street
Ann Arbor, Michigan 48108

J. HAROLD FLANNERY
ROBERT PRESSMAN
Larsen Hall, Appian Way
Cambridge, Mass. 02138

JACK GREENBERG
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

ELLIOTT HALL
950 Guardian Building
Detroit, Michigan 48226

Attorneys for Respondents
Ronald Bradley, et al.,
Plaintiffs Below

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Questions Presented	1
Constitutional and Statutory Provisions Involved	2
Counter-Statement of the Case	2
A. Nature of Review	2
B. The Proceedings Below	11
1. Preliminary Proceedings	11
2. Hearings on Constitutional Violation	16
3. Remedial Proceedings	19
a. The Practicalities of the Local Situation	19
b. The District Court's Guidance by Settled Equitable Principles and Its Order to Submit Plans	23
c. The Procedural Status of Suburban Intervenors	26
d. Hearings and Decision on Plans Limited to the DSD	27
e. The Hearings and Decision on "Metropolitan" Plans	28
4. Appellate Proceedings	32
5. Proceedings on Remand	37
Summary of Argument	38

PAGE

ARGUMENT—

I. Introduction 40

II. The Nature and Scope of the School Segregation of Black Children by the Detroit and State Authorities Provided the Correct Framework for the Lower Court's Consideration of Relief Extending Beyond the Geographic Limits of the Detroit School District 43

III. Based Upon Their Power and Duty to Achieve a Complete and Effective Remedy for the Violation Found, Taking Into Account the Practicalities of the Situation, the Courts Below Were Correct in Requiring Interdistrict Desegregation 53

IV. The Actions by the Lower Courts to Date Have Not Violated Any Federally Guaranteed Procedural Right of Suburban School Districts 61

A. In the Circumstances of this Case, Rule 19 and Traditional Principles of Equity Jurisprudence Do Not Require the Joinder of Several Hundred Local Officials Where the Parties Already Before the Court Can Grant Effective Relief and There Remains a Substantial Uncertainty Whether and How Their Interests Will Be Affected, If At All 67

B. Petitioner and Amici School Districts Have Not Been Denied Any Procedural Rights Guaranteed to Them By the Fifth and Fourteenth Amendments 74

CONCLUSION 78

NOTE ON FORM OF RECORD CITATIONS 80

Table of Authorities

Cases: PAGE

Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957), aff'd sub nom. Faubus v. United States, 254 F.2d 797 (8th Cir. 1958) 71n
Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) 24n, 27
American Const. Co. v. Jacksonville T. & K. R. Co., 148 U.S. 372 (1893) 13n, 43n
Attorney General v. Lowery, 131 Mich. 639 (1902), aff'd 199 U.S. 233 (1905) 8n, 71, 76n

Baker v. Carr, 369 U.S. 186 (1962) 51
Berry v. School Dist. of Benton Harbor, Civ. No. 9 (W.D. Mich. February 3, 1970) 22n
Bradley v. Milliken, 468 F.2d 902 (6th Cir.), cert. denied, 409 U.S. 844 (1972) 25n
Bradley v. Milliken, 438 F.2d 945 (6th Cir. 1971) 15
Bradley v. Milliken, 433 F.2d 897 (6th Cir. 1970) 15
Bradley v. School Bd. of Richmond, 462 F.2d 1058 (4th Cir. 1972), aff'd by equally divided Court, 412 U.S. 92 (1973) 19n, 60n, 61n
Bradley v. School Bd. of Richmond, 51 F.R.D. 139 (E.D. Va. 1970) 75
Brewer v. School Bd. of Norfolk, 397 F.2d 37 (4th Cir. 1968) 8n
Broughton v. Pensacola, 93 U.S. 266 (1876) 8n
Brown v. Board of Educ., 347 U.S. 483 (1954) ..... *Passim*
Brown v. Board of Educ., 349 U.S. 294 (1955) 3, 5, 13n, 40, 59
Brunson v. Board of Trustees, 429 F.2d 820 (4th Cir. 1970) 30n

Carrington v. Rash, 380 U.S. 89 (1965) 58

PAGE

Carter v. West Feliciana Parish School Bd., 396 U.S. 290 (1970) 24n
Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142 (5th Cir. 1972), cert. denied, 37 L.Ed.2d 1041, 1044 (1973) 7n
City of Kenosha v. Bruno, 412 U.S. 507 (1973) 76n
City of New Orleans v. New Orleans Water Works Co., 142 U.S. 79 (1891) 77n
Civil Rights Cases, 109 U.S. 3 (1883) 3
Commanche County v. Lewis, 133 U.S. 198 (1890) 8n
Comstock v. Group of Inst'l Investors, 335 U.S. 211 (1948) 43n
Connecticut Gen'l Life Ins. Co. v. Johnson, 303 U.S. 77 (1938) 76n
Cooper v. Aaron, 358 U.S. 1 (1958) 8n, 42n, 49, 50n, 64n

Davis v. Board of School Comm'rs, 402 U.S. 33 (1971) 5, 10, 23, 41
Davis v. School Dist. of Pontiac, 443 F.2d 573 (6th Cir.), cert. denied, 402 U.S. 913 (1971) 8n
Davis v. School Dist. of Pontiac, 309 F. Supp. 734 (E.D. Mich. 1970), aff'd 443 F.2d 573 (6th Cir.), cert. denied, 402 U.S. 913 (1971) 22n
Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967) 45
Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) 3

Edgar v. United States, 404 U.S. 1206 (1971) 49n
Essex Public Road Bd. v. Skinkle, 140 U.S. 334 (1891).. 77n
Evans v. Buchanan, 281 F.2d 385 (3d Cir. 1960) 66
Evans v. Buchanan, 256 F.2d 688 (3d Cir. 1958) 56, 66, 71
Ex parte Virginia, 100 U.S. 339 (1880) 3, 8n, 41n, 55
Ex parte Young, 209 U.S. 123 (1908) 49n

PAGE

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 8n
Graham v. Folsom, 200 U.S. 248 (1906) 8n
Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1948)....13n, 43n
Green v. County School Bd., 391 U.S. 430 (1968) 5, 7n, 10, 41, 47, 55
Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964) 50, 70, 71n, 74n
Griffin v. State Bd. of Educ., 239 F. Supp. 560 (E.D. Va. 1965) 32, 71

Hague v. C.I.O., 307 U.S. 496 (1939) 77
Haycraft v. Bd. of Educ. of Louisville, No. 73-1408 (6th Cir., Dec. 28, 1973) 48n
Higgins v. Grand Rapids Bd. of Educ., Civ. No. 6386 (W.D. Mich. 1973) 22n
Hoots v. Commonwealth of Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973) 56, 66, 70, 71
Hunter v. Erickson, 393 U.S. 385 (1969) 14n
Hunter v. Pittsburgh, 207 U.S. 161 (1907) 71, 76
Husbands v. Commonwealth of Pennsylvania, 359 F. Supp. 925 (E.D. Pa. 1973) 70, 71

James v. Valtierra, 402 U.S. 137 (1971) 59

Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972), cert. denied, 37 L.Ed.2d 1041 (1973) 7n
Kelley v. Metropolitan County Bd. of Educ., 463 F.2d 732 (6th Cir.), cert. denied, 409 U.S. 1001 (1972)....42, 62n
Kelley v. Metropolitan County Bd. of Educ., Civ. No. 2094 (M.D. Tenn., June 28, 1971), aff'd 463 F.2d 732 6th Cir.), cert. denied, 409 U.S.1001 (1972) 31n
Kentucky v. Indiana, 281 U.S. 163 (1930) 72
Keyes v. School Dist. No. 1, 413 U.S. 189, 37 L.Ed.2d 548 (1973) .....*Passim*

PAGE

Lane v. Wilson, 307 U.S. 268 (1939) 14n
Lau v. Nichols, 42 U.S.L.W. 4165 (Jan. 12, 1974) 65n
Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala.), aff'd per curiam 389 U.S. 215 (1967) 66
Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y.), aff'd per curiam, 402 U.S. 935 (1971) 14n
Lemon v. Bossier Parish School Bd., 240 F. Supp. 709 (W.D. La. 1965), aff'd 370 F.2d 847 (5th Cir. 1967).... 65n

Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803) 78
Mobile v. Watson, 116 U.S. 289 (1886) 8n
Monroe v. Board of Comm'rs, 391 U.S. 450 (1968) 10
Mount Pleasant v. Beckwith, 100 U.S. 514 (1879) 8n
NAACP and Taylor v. Lansing Bd. of Educ., —— F. Supp. —— (W.D. Mich. 1973) 22n
Neal v. Delaware, 103 U.S. 386 (1881) 3
Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County, No. 73-1403 (6th Cir., December 28, 1973) 48n
New Jersey v. New York, 345 U.S. 369 (1953) 72, 77n
Northwestern Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243 (1906) 78

Oliver v. School Dist. of Kalamazoo, 346 F. Supp. 766 (W.D. Mich.), aff'd 418 F.2d 635 (6th Cir. 1971), on remand, Civ. No. K-98-71 (Oct. 4, 1973) 22n

Plessy v. Ferguson, 163 U.S. 537 (1896) 3, 10n, 11n, 78
Provident Bank v. Patterson, 390 U.S. 102 (1968)..68n, 69n

Raney v. Board of Educ., 391 U.S. 443 (1968) 10
Reynolds v. Sims, 377 U.S. 533 (1964) 8n, 55
Robinson v. Shelby County Bd. of Educ., 330 F. Supp. 837 (W.D. Tenn. 1971), aff'd 467 F.2d 1187 (6th Cir. 1972) 70n

PAGE

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) 58n, 59
Santa Clara County v. Southern R. Co., 118 U.S. 394 (1886) 76n
School Dist. of Ferndale v. HEW, No. 72-1512 (6th Cir., March 1, 1973) 20n, 22n
Schrader v. Selective Service System Local Bd. No. 76, 329 F. Supp. 966 (W.D. Wis. 1971) 64n
Shapiro v. Thompson, 394 U.S. 618 (1969) 59
Shapleigh v. San Angelo, 167 U.S. 646 (1897) 8n
Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873) .. 3
Sloan v. Tenth School Dist., 433 F.2d 587 (6th Cir. 1970) 8n
South Carolina v. Katzenbach, 383 U.S. 301 (1966) 76
Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970) 8n
Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), aff'd per curiam 404 U.S. 1027 (1972) 42n, 59
Stamps and United States v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973) 7n
Strauder v. West Virginia, 100 U.S. 303 (1880) 3
Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) .. 33n
Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) ..... *passim*

Trenton v. New Jersey, 262 U.S. 182 (1923) 77
Turner v. Warren County Bd. of Educ., 313 F. Supp. 380 (E.D.N.C. 1970) 49n

United States v. Board of School Comm'rs of Indianapolis, 474 F.2d 82 (7th Cir. 1973), cert. denied, 37 L.Ed.2d 1041 (1973) 8n
United States v. Georgia, 466 F.2d 197 (5th Cir. 1972) 66, 70n, 74n

PAGE

United States v. Georgia, 445 F.2d 303 (5th Cir. 1971) 66
United States v. Georgia, 428 F.2d 377 (5th Cir. 1970) 66
United States v. Johnston, 268 U.S. 220 (1925) 13n, 43n
United States v. School Dist. 151, 404 F.2d 1125 (7th Cir. 1968) 8n
United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972) 49, 54n, 58n
United States v. State of Missouri, 363 F. Supp. 739 (E.D. Mo. 1973) 55
United States v. Texas Educ. Agency, 321 F. Supp. 1043 (E.D. Tex. 1970), 330 F. Supp. 235 (E.D. Tex. 1971), aff'd sub nom. United States v. State of Texas, 447 F.2d 441 (5th Cir. 1971), stay denied, 404 U.S. 1206 (Black, *J.*), cert. denied, 404 U.S. 1016 (1971)..66, 70

Welling v. Livonia Bd. of Educ., 382 Mich. 620 (1969).... 65
Western Turf Ass'n v. Greenberg, 204 U.S. 359 (1907).. 77
Wheeling Steel Corp. v. Glander, 377 U.S. 562 (1949).... 76n
Whitcomb v. Chavis, 403 U.S. 124 (1971)..... 59
White v. Regester, 37 L.Ed.2d 314 (1973)..... 59
Wright v. Council of the City of Emporia, 407 U.S. 451 (1972) 10, 13n, 48, 54n, 58n, 59

Constitution and Statutes:

U.S. Const., Amend. 5 75
U.S. Const., Amend. 14 75
28 U.S.C. §1292 33
28 U.S.C. §1331(a) 11
28 U.S.C. §1343 11

PAGE

28 U.S.C. §§2201, 2202 11
42 U.S.C. §1981 ..... 2, 11
42 U.S.C. §1983 ..... 2, 11, 76n
42 U.S.C. §1988 ..... 2, 11, 33n
42 U.S.C. §2000d 2, 11, 65n
Mich. Const. Art. I, §2 65
Mich. Const. Art. VIII, §3 65
M.C.L.A. §340.69 ..... 57n
M.C.L.A. §340.121(d) 57n
M.C.L.A. §340.183 et seq. 58n
M.C.L.A. §252-53 65
M.C.L.A. §340.302a et seq. 58n
M.C.L.A. §340.355 65
M.C.L.A. §340.582 ..... 57n
M.C.L.A. §340.583 ..... 52n
M.C.L.A. §340.589 ..... 52n
M.C.L.A. §340.1359 ..... 58n
M.C.L.A. §340.1582 ..... 58n
M.C.L.A. §388.171a et seq. (Public Act 48 of 1970) 51
M.C.L.A. §388.681 ..... 58n
M.C.L.A. §388.851 65
M.C.L.A. §388.1010 ..... 20n, 65
M.C.L.A. §388.1117 65
M.C.L.A. §388.1234 65

PAGE

Rules:

F.R. Civ. P. 19 ..... 32, 37, 67

F.R. Civ. P. 21 ..... 32, 37, 68

F.R. Civ. P. 54(b) 33

F.R. Civ. P. 65(d) 64n

Supreme Court Rule 23(c)(1) 42n

Supreme Court Rule 40(1)(d)(2) 42n

Other Authorities:

Bureau of the Census, General Social and Economic Characteristics (1970), Tables 119-120, 125 54

Michigan House Journal (1970) 14n

3A Moore's Federal Practice ¶19.107[3] (2d ed. 1972).. 68n

Notes of the Advisory Committee, 1966 Amendments, Rule 19 ..... 67, 68n

Opinions of the Attorney General of Michigan 77n

Wright & Miller, Federal Practice and Procedure (1970) 73n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-434

WILLIAM G. MILLIKEN, *et al.*,

Petitioners,

vs.

RONALD G. BRADLEY, *et al.*

Respondents.

No. 73-435

ALLEN PARK PUBLIC SCHOOLS, *et al.*,

Petitioners,

vs.

RONALD G. BRADLEY, *et al.*

Respondents.

No. 73-436

THE GROSSE POINTE PUBLIC SCHOOL SYSTEM, *et al.*,

Petitioners,

vs.

RONALD G. BRADLEY, *et al.*

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

Questions Presented

1. May the State of Michigan continue the intentional confinement of black children to an expanding core of

state-imposed black schools within a line, in a way no less effective than intentionally drawing a line around them, merely because petitioners seek to interpose an existing school district boundary as the latest line of containment?

2. Where further proceedings among all conceivably affected petitioner and amici school districts are poised below, at which all parties have a meaningful opportunity to be heard prior to the entry of any injunctive order, should this Court vacate the prior rulings of the lower courts, dismiss this case, and hold that the three and one-half years of prior adversary proceedings between plaintiffs and State and Detroit defendants are for naught because suburban school districts were not joined as parties at the outset of this litigation?

Constitutional and Statutory Provisions Involved

This case involves primarily the application of the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States. In addition to the other constitutional and statutory provisions cited by petitioners, this case also involves the Thirteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981, 1983, 1988 and 2000d, as well as certain other provisions of Michigan law set forth by Respondents Board of Education of the City of Detroit, et al.

Counter-Statement of the Case

A. *Nature of Review*

The Reconstruction Amendments, particularly the Fourteenth, were made part of the United States Constitution primarily in order to abolish the institution of slavery and all its trappings so that freedmen and their descendants, as

individuals and as a class, could be made not only persons and citizens in the eyes of the law and this Court (*see Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1856)), but also *equal* to the dominant white class, at least in all the public affairs and public institutions of and within each of the States of the Union. *Slaughter House Cases*, 83 U.S. (16 Wall) 36 (1873); *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); *Ex Parte Virginia*, 100 U.S. 339 (1880); *Neal* v. *Delaware*, 103 U.S. 386 (1881); *Civil Rights Cases*, 109 U.S. 3 (1883).[1] Nevertheless, with the express sanction of this Court in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), enforced segregation replaced slavery to perpetuate the second-class public (as well as private) status and state-imposed badge of inferiority of black people.[2] In *Brown* v. *Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955), the first of many frontal assaults on public segregation in many areas, this Court finally repudiated any type of official segregation in public schooling precisely because such segregation violates the fundamental purpose of the Fourteenth Amendment as initially construed by this Court. See *Brown I*, 347 U.S. at 490-491 and n.5.

---

[1] "[The Fourteenth Amendment] nullifies and makes void all state legislation, and state action of every kind, . . . which denies to any [citizen of the United States] the equal protection of the laws." 109 U.S. at 11. The Reconstruction Amendments had as their "common purpose" to secure "to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the [white] race enjoy . . . ; and in regard to the colored race, for whose protection the [Fourteenth] Amendment was primarily designed, that no discrimination shall be made against them by law because of their color." 100 U.S. at 306. "[L]ying at the foundation of the [Reconstruction Amendments was] the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him." 83 U.S. (16 Wall.) at 71.

[2] Dissenting in *Plessy*, Mr. Justice Harlan prophetically noted "[i]n my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case." 163 U.S. at 559.

Yet from *Brown* to this day black children in Detroit have suffered from just such constitutionally offensive, state-imposed school segregation. After extensive hearings the record evidence showed, and the District Court found, that from at least 1954 through the trial respondent black children have been intentionally assigned by a variety of *de jure* devices to virtually all-black (90% or more black) schools. (J. 17a, *et seq.*)* Throughout this period the pattern was and is unmistakable: State and Detroit school authorities, operating in lockstep both with pervasive residential segregation throughout the metropolitan area (itself primarily the product of public and private discrimination, including the widespread effects of *de jure* school practices) and with discriminatory state policies, intentionally assigned the rapidly growing numbers of Detroit black children to an expanding core of virtually all-black schools separate from and immediately surrounded by a reciprocal ring of virtually all-white schools nearby. The ring of white schools in some places began within Detroit proper and in other places at the school district line but extended throughout the metropolitan area.

At the time of trial over 132,700 black children, 75% of the total within Detroit, were thus *de jure* segregated in this core of 133 virtually all-black schools covering almost the entire Detroit School District and reaching in many instances right up to the boundaries of the suburban school districts; the surrounding suburban school districts served pupil populations over 98% white (excluding the few historically black suburban enclaves, the percentage is well over 99). (J. 23a-28a; J. 54a-55a; J. 77a-78a; J. 87a). Thus, as concluded by the Court of Appeals in affirming

---

* A note explaining record citations follows the body of this Brief.

the District Court's finding of a massive and pervasive constitutional violation (J. 118a-159a), "even if the segregation practices were a bit more subtle than the compulsory segregation statutes . . ., they were nonetheless effective." (J. 158a).

Insofar as practicable and feasible, therefore, the lower courts concluded that such longstanding and massive violation required the complete and effective disestablishment of the present and expanding, state-imposed core of "black schools," now and hereafter, considering the alternatives available and the practicalities of the local situation, pursuant to the commands of *Brown I* and *II; Green* v. *County School Board,* 391 U.S. 430 (1968); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.,* 402 U.S. 1 (1971); and *Davis* v. *Bd. of School Commr's,* 402 U.S. 33 (1971). (J. 42a, J.50a-51a; J. 56a, J. 60a; J. 84a; J. 158a-159a, 162a, 176a-189a). Based on the record evidence the District Court found that a plan of actual desegregation limited to the Detroit School District would only perpetuate the violation: the core of schools racially identified by *de jure* acts as "black," immediately surrounded by a ring of virtually all-white schools, would remain essentially intact. Any remedy confined within the borders of the Detroit School District would merely expand the state-imposed black core the little remaining way right up to the borders of the suburban districts. Such narrow relief would "lead directly to a single segregated Detroit School District overwhelmingly black in all of its schools surrounded by a ring of [suburban schools] overwhelmingly white. . . ." (J. 172a-173a) due to the environment for segregation already fostered in the area and the flight of many of the remaining whites from the Detroit School District to the nearby all-white suburban sanctuaries. (J. 192-28a; J. 54-55a, J. 87a-88a; J. 157a-165a; J. 172a-173a).

The courts below, therefore, carefully assayed the practicalities of the local situation, state law and practice, and the proof to determine whether existing school district boundaries are absolute barriers to more effective and complete disestablishment of the state-imposed black core surrounded by a reciprocal white ring. They were forced to ask what justification existed for permitting school district lines to serve as merely the most recent state-created and maintained racial barrier.

The lower courts ascertained that existing school districts are subordinate instrumentalities of the state created to facilitate administration of the State's system of public schooling; that the State has the ultimate responsibility for insuring that public education is provided to all its children on constitutional terms and that no school is kept for (or from) any person on account of race; that the defendant State Superintendent and State Board have considerable affirmative power over, and the power to withhold necessary aid from, local school districts to insure their compliance with the commands of law; that the existing school district boundaries are unrelated in many instances even to intermediate and regional school district lines, and generally bear no relationship to other municipal, county or special district governments; that the existing school district boundaries have been regularly crossed, modified or abrogated for educational purposes and convenience, as well as for segregation; that the State has acted directly to control local school districts, including to maintain, validate and augment school segregation; that existing state law provides detailed and time-tested methods for handling the administrative problems associated with pupil transfers across districts and modifying school district boundaries by annexation or consolidation; that any legitimate state interest

in delegating administration of public schooling to any degree in any fashion to local units could be promoted by a variety of arrangements not requiring that existing school district lines serve as an impenetrable barrier to desegregation across those lines; that for most social and economic and governmental purposes, the metropolitan area represents one inter-related community of interest for both blacks and whites, except with respect to schools and housing;[3] and that the Detroit Public Schools are not a separate

[3] We do not mean to suggest that blacks as a class have not been subjected to all variety of other forms of public and private racial discrimination and intentional segregation in the Detroit area. *See, e.g., Stamps and United States* v. *Detroit Edison*, 365 F. Supp. 87 (E.D. Mich. 1973) (employment discrimination). Rather, we mean to suggest that enforced separation of black citizens as a group from whites is primarily evidenced by the racially dual system of schools and housing. Thus, in this classic school segregation case, even if public authorities could shift the burden of school desegregation to black parents contrary to *Green* and *Swann*, the record evidence proves that black parents have long been, still are, and for the foreseeable future will remain effectively excluded from white schools as long as the only means of gaining admission is purchasing or renting a home in the exclusively white residential areas. (E.g., Ia 156 *et seq.*; IIa 19—IIa 81 P.X. 184; P.X. 2; P.X. 16A-D; P.X. 48; P.X. 183A-G; P.X. 122; 1 Tr. 163; P.X. 25; P.X. 37; P.X. 38; P.X. 56; P.X. 18A; P.X. 136A-C.) As found by the District Court with respect to the entire metropolitan area, black citizens are generally confined to separate and distinct areas within Detroit and excluded from the suburbs, "in the main [as] the result of past and present practices and customs of racial discrimination, both public and private, which have and do restrict the housing opportunities of black people." (J. 23a). Needless to say, the black schools are not any more likely to witness an influx of white students as long as white parents (fleeing Detroit proper, immigrating for the first time to the Detroit area, or already residing in the suburbs) remain sentient and the dual pattern persists protected by school district lines: the black core is the school system maintained for blacks while favored suburban systems will remain securely white behind residential segregation, school district boundary lines, and whatever new school facilities are needed to accommodate these "whites only." (Cf. J. 79a-80a, 87a-88a) Courts of Appeals currently agree that such effectively exclusionary schooling is an independent constitutional violation. *See, e.g., Cisneros* v. *Corpus Christi Ind. Sch. Dist.*, 467 F.2d 142, 149 (5th Cir. 1972), *cert. denied*, 37 L.Ed2d 1041, 1044 (1973); *Kelley* v. *Guinn*, 456 F.2d

and isolated island of segregation but rather are inextricably part of the State System of public schooling.[4] (J. 36a-38a; J. 50a; J. 79a-80a; J. 96a; 137a-140a; 151a; J. 165a-171a).

---

100 (9th Cir. 1972), *cert. denied*, 37 L.Ed.2d 1041 (1973); *Davis* v. *School Dist. of City of Pontiac*, 443 F.2d 573, 576 (6th Cir. 1971), *cert. denied*, 402 U.S. 913 (1971); *U.S.* v. *Bd. of Sch. Commissioners of Indianapolis*, 474 F.2d 82 (7th Cir. 1973), *cert. denied*, 37 L.Ed.2d 1041 (1973); *U.S.* v. *School District 151*, 404 F.2d 1125 (7th Cir. 1968); *Spangler* v. *Pasadena City Bd. of Educ.*, 311 F. Supp. 501 (C.D. Cal. 1970); *cf. Swann*, 402 U.S. at 20-21; *Brewer* v. *Norfolk*, 397 F.2d 37, 41-42 (4th Cir. 1968); *Sloan* v. *Tenth School District*, 433 F.2d 587, 588 (6th Cir. 1970). As the "remedy" apparently proposed by petitioners for the massive violation here, such a racially exclusive system of schooling is a mockery.

[4] The courts below thus analyzed this case in accordance with Fourteenth Amendment principles early established and, since *Brown*, re-established by this Court:

> The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government . . . , denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it.

Ex Parte Virginia, 100 U.S. 339, 346-47 (1880); *Cooper* v. *Aaron*, 358 U.S. 1, 17-20 (1958). School districts in Michigan are not separate and distinct sovereign entities, but rather are "auxiliaries of the state," subject to its "absolute power." *Attorney General* v. *Lowrey*, 199 U.S. 233, 239-240 (1905), *aff'g* 131 Mich. 639 (1902). And the State of Michigan's "absolute power" over its school districts must be exercised in accord with the supreme commands of the Federal Constitution: "[The Thirteenth and Fourteenth Amendments] were intended to be, what they really are, limitations of the power of the States. . . ." *Ex Parte Virginia*, 100 U.S. at 345. Accord, *Broughton* v. *Pensacola*, 93 U.S. 266 (1876); *Mount Pleasant* v. *Beckwith*, 100 U.S. 514 (1879); *Mobile* v. *Watson*, 116 U.S. 289 (1886); *Comanche County* v. *Lewis*, 133 U.S. 198 (1890); *Shapleigh* v. *San Angelo*, 167 U.S. 646 (1897); *Graham* v. *Folsom*, 200 U.S. 248 (1906); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

Viewing these practicalities of the local situation in the context of the nature and extent of the violation and the inadequacy of relief confined within the borders of the Detroit School District, the lower courts determined that the equitable power of federal courts to disestablish now and hereafter the present and expanding state-imposed core of black schools was not limited to the boundaries of the Detroit School District—precisely because such freezing of existing boundaries would merely serve to perpetuate in full force the intentional assignment of black children to a separate core of "black schools," identified as such by *de jure* state action, immediately surrounded by a ring of all-white schools nearby. With equity power to do more, however, the lower courts (pursuant to the joint suggestions by State defendants and plaintiffs) exercised their discretion to defer decision on any substantial modification of existing school districts or school district lines to the State. Pending such state determination, any desegregation across school district lines was to be accomplished by the method least intrusive on existing arrangements, by contracts and pupil transfers between the existing school districts pursuant to the provisions of state law. (J. 80a; J. 177a, J. 188a-189a).

The narrow issue of substance on review by this Court, then, is whether petitioners' argument that the school district lines may be interposed in such circumstances to perpetuate the walling-off of blacks in a state-imposed core of overwhelmingly black schools separated from a ring of overwhelmingly white schools only by that line is constitutionally acceptable: are existing school district boundary lines, whose justification on this record is that they are and have been there, really constitutionally immune? May school district lines thereby serve to segregate black from white children in a way that a school zone line (*Swann*), or

super highway (*Davis*), or newly created school district line (*Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972)), or other artifact of school administration (*Green*; *Raney* v. *Bd. of Ed.*, 391 U.S. 443 (1968); *Monroe* v. *Bd. of Commrs.*, 391 U.S. 450, (1968)), however untainted their genesis, may not?[5] In historic perspective then, if the petitioners are correct, all will understand that *Brown's* reach has exceeded our grasp: along the existing school district line may *Plessy* be reconstructed *sub silentio*.[6]

---

[5] Due to the State defendants' default in failing to comply with the District Court's orders, no actual plan of desegregation extending beyond the borders of the Detroit School District has ever been submitted to or considered by the District Court. (J. 62a-64a). The appeal to the court below was on an interlocutory basis. (J. 108a; J. 112a: Ia 265-266). On remand, proceedings are already underway among all conceivably interested parties in the District Court in order to develop and consider such plans and to cure the potential procedural error, ascribed to the District Court by the Court of Appeals, in failing to give districts potentially affected by any plan ordered the prior opportunity to be heard. (J. 176a-179a; Ia 287-302). Review by this Court at this basically interlocutory stage of the proceedings, therefore, is premature for the reasons previously stated in our Memorandum in Opposition to Petitions for Writs of Certiorari. Review at this posture, however, does permit consideration of the pure legal issue wholly free from jockeying about walk-in schools and reasonable time and distance limitations for transporting pupils to schools; for here the school district line separates the black schools on the edge of the black core from many adjacent, conveniently walk-in, all white schools. *Compare Swann*, 402 U.S. at 29-31, *with Keyes* v. *School District No. 1*, 37 L.Ed.2d at 572-3, 581 (separate opinion of Powell, J.).

[6] Petitioners, public servants serving predominantly white constituencies, argue to the contrary, that black plaintiffs premise their case for relief beyond the Detroit School District on an assumption of inferiority of blacks and the *per se* unconstitutionality of majority black schools rather than the enforced segregation of black children as a class from whites. Such a suggestion from public officials in 1974 is old wine in new bottles; it is no more and no less than the racial sophistry adopted almost 80 years ago by this Court in *Plessy* in rejecting black plaintiffs' consistent argument, from Reconstruction to this very day, that "the enforced segregation of the races stamps the colored race with a badge of inferiority":

> If this be so, it is not by reason of anything found in the act,

B. *The Proceedings Below*

1. Preliminary Proceedings

Plaintiffs commenced this action over three years ago, August 18, 1970, invoking the jurisdiction of the District Court under 28 U.S.C. §§ 1331(a), 1343(3) and (4), and asserting causes of action arising under 42 U.S.C. §§ 1981, 1983, 1988, 2000d and the Thirteenth and Fourteenth Amendments to the Constitution. Plaintiffs sought declaratory (28 U.S.C. §§ 2201, 2202) and injunctive relief against Michigan's Governor, Attorney General, Superintendent of Public Instruction and State Board of Education, and the Detroit Board of Education, its members and Superintendent of Schools,[7] alleging *de jure* segregation of the Detroit Public Schools resulting from historic public policies, practices and action. Plaintiffs sought complete and lasting relief from that segregation, which keeps well over 132,000 black children in a core of over 130 virtually all-black schools segregated from white children in a ring of virtually all-white schools.

---

but solely because the colored race chooses to put that construction on it. 163 U.S. 537, 551 (1896).

With respect to such *ad hominem* attacks by petitioners on black plaintiffs' goal of eradicating state-imposed segregation completely and forever, nothing further need be said. However, as petitioners make this same racial attack on the personal motives of the lower court judges in ruling on this case (see, e.g., Grosse Pointe Brief 43-45; Allen Park Brief 51; Allen Park Petition 13-14; State Petition 13-14, 35), we feel compelled to set the record straight, point by point. See *infra*, pp. 15, 23-25, 30-31. It is sufficient for our purpose here that petitioners' suggestion that the lower court judges are racists at heart in seeking desegregation beyond the geographic limits of the Detroit School District recalls precisely the harsh realities of the *Plessy* rationale in blunting the Fourteenth Amendment until discredited, finally, by the promise of *Brown*.

[7] The Detroit Federation of Teachers and a group representing white homeowners within Detroit intervened as parties defendant prior to trial on the merits.

The filing of the complaint was precipitated by the State of Michigan's then most recent, direct imposition of school segregation on these black children. The State, "exercising what Michigan courts have held to be is 'plenary power' which includes power 'to use a statutory scheme, to create, alter, reorganize or even dissolve a school district, despite any desire of the school district, its board, or the inhabits thereof,'" (J. 27a) had acted with unusual dispatch following a Detroit Board adoption, its first ever, of even a small scale, two-way high school desegregation attempt along with a state-mandated decentralization program. In conjunction with a local recall of the Detroit Board members who supported even this initial effort to breach the dual structure by assigning white children to black schools, the legislature passed Public Act 48 of 1970 (Ia 10-14) as a direct response to obstruct such action forever.

Act 48 (1) reorganized the Detroit School District (hereafter DSD), created racially discrete regional sub-districts wholly within the DSD, and *revalidated* the external boundaries of the DSD, all in the face of alternative proposals to decentralize school administration in the metropolitan area across the borders of the DSD to accomplish desegregation (Compare Ia 10-14 and Ia 35 with Va 91-101 and Ia 26); (2) unconstitutionally nullified the previous high school desegregation effort of the Detroit Board; and (3) interposed for the DSD, and *no* other school district, unconstitutional pupil assignment criteria of "free choice" and "neighborhood" which (as later found by the District Court) "had as their purpose and effect the maintenance of segregation." (J. 27a-28a; see also 433 F.2d 897). On a racial basis the State maintained inviolate the core of black schools and singled out the DSD (and its mass of black citizens) for separate treatment from all other (and overwhelmingly white) school districts.[8]

[8] In all these respects, the District Court found Act 48 to be one of the examples where the "state and its agencies, in addition to

Plaintiffs prayed for a preliminary injunction to reinstate the partial plan of high school desegregation adopted

---

their general responsibility for and supervision of public education, have acted directly to control and maintain the pattern of segregation in the Detroit schools." (J. 27a). Petitioners' arguments that Act 48 either had no racial purpose (Grosse Pointe Brief 22) or effect (State Brief 40-41) ignore the entire record evidence of violation and the context in which this Act was so precipitously adopted. In this respect, as so many others, petitioners seek to have this Court review each finding of fact separately and in complete isolation from each other fact, historical context, and the careful deliberations of the District Judge over the whole record evidence. Such "fact" ploy is understandable but only clouds the significant legal and constitutional issue which this Court must decide. It also is contrary to this Court's traditional reliance on district court factual determinations, affirmed by courts of appeals, in the context of the myriad local conditions presented by different cases, particularly school segregation cases. *See, e.g., Wright* v. *Emporia*, 407 U.S. at 466; *Swann*, 402 U.S. at 28; *Brown II*, 349 U.S. at 299; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *Amer. Const. Co.* v. *Jacksonville T. & K. R. Co.*, 148 U.S. 372, 384 (1893); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1948). It is sufficient for our purposes here with respect to the motive of Act 48 to note the following: Then Detroit Superintendent Drachler's uncontroverted testimony was that Act 48 was "an attempt then to turn the door back or the pages back." (8/29/70 preliminary hearings Tr. 202; see also IIIa 244-245). Then Board President Darneau Stewart, subsequently recalled for his support of the partial desegregation plan, stated with respect to Act 48, "I do regret that the legislature has found it necessary to intervene in our carefully outlined plans and hopes . . ." (8/29/70 preliminary hearings Tr. 327-28).

Petitioners' citation to the ultimate votes of black legislators in favor of Act 48 (Grosse Pointe Brief 21-22) is only the most recent example of the kind of misleading irrelevancy that petitioners have interjected from time to time to divert rather than advance the inquiry in this case, akin to their implication that plaintiffs must be ill with self-hate because we prefer constitutional schools to separate-but-equal schools. Here, petitioners seek to obscure the fact that such approval was merely a final vote on a general bill reflecting political acceptance of the legislative reality. Black legislators acceded to the already legislatively mandated segregation in return for the hope of a modicum of the same control over the "black schools" as whites maintained over their white suburban school district enclaves. At earlier stages in votes on particular parts of the bill, black legislators vociferously opposed the Act whose purpose and effect were to roll back initial efforts at desegregation, reimpose segregated pupil assignments,

by the Detroit Board but thwarted by Act 48, pending a full hearing on the merits. After a preliminary hearing,

---

and ever after insure that white children would not again be assigned to black schools. For example:

> Rep. Vaughn: "First, the House today, and I think this is perhaps the saddest day—April 9 will go down in history—in Michigan history. It is the day the House of Representatives, at the State Capitol, Michigan, voted officially to nullify the Bill of Rights and the Constitution and violate the basic laws of the United States Supreme Court. . . . And what did the State House today say: We *must* segregate. *Nullification.* This is what southern senators do—plot on how to circumvent a basic rule, a basic rule that would bring the schools together." House Journal No. 49, p. 1120 (April 9, 1970).
>
> Rep. Mrs. Elliott: "The passage of this bill is a step backwards because of the crippling amendments that will continue to perpetuate segregation." House Journal No. 49, p. 1122 (April 9, 1970).
>
> Rep. Mrs. Saunders, June 5, 1970, House Journal No. 88, p. 2160: "I voted no on the Senate substitute for House bill no. 3913 because I believe it can only have the result of furthering and intensifying segregation in education, a segregation which has been contrary to the law of the land since 1954. *Many of you sat smugly in Michigan while the southern states protested the Brown* v. *Topeka Board of Education landmark decision. You thought you were so much more virtuous in this basic humanitarian tenet of considering all men as equal and realizing that separate is not, never was, and never can be equal.* . . . I am disappointed—I'm deeply disappointed—I'm ashamed of your action and response to racist fears. You have helped to both divide and move our society in a backward direction." (Emphasis supplied).

Thus, the racial purpose underlying Act 48 is as obvious as any of the Jim Crow laws. And its pervasive stigmatizing effects extend beyond the borders of the DSD. For with respect to the segregative pupil assignment criteria, the State intentionally created what amounts to a racial classification between the DSD and all other school districts (*Cf. Lane* v. *Wilson*, 307 U.S. 268 (1939); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y.), *aff'd per curiam*, 402 U.S. 935 (1971)), and thereby affixed the State's badge of approval on the maintenance in the Detroit area of a separate core of black schools surrounded by a ring of all-white schools. It should be no consolation to petitioners that Michigan's first Jim Crow school law followed Reconstruction by 100 years. (*See also* discussion *infra*, p. 52).

beginning August 27, 1970, the District Court denied all preliminary relief and dismissed the Governor and Attorney General by ruling and order of September 3, 1970. (Ia 59-63.) On Plaintiffs' appeal the Court of Appeals for the Sixth Circuit affirmed the denial of preliminary relief but held Act 48 unconstitutional insofar as it nullified the initial steps taken by the Detroit Board to desegregate high schools and interposed segregative pupil assignment criteria for the DSD. In remanding for a hearing on the merits the Court also directed that the Governor and Attorney General remain parties defendant. *Bradley* v. *Milliken*, 433 F.2d 897 (6th Cir. 1970).

On remand, the plaintiffs sought again to require the immediate implementation of the Board's high school plan as a matter of interim relief to remedy some of the mischief created by the enactment of the unconstitutional statute, without determination of the more general issues raised in the complaint. Instead, the District Court permitted the Detroit Board of Education to propose alternative plans and on December 3, 1970 approved one of them (Ia 88-97) (a "free-choice" approach which later proved upon implementation to be not only wholly ineffective but also an independent violation (J. 54a)); plaintiffs again appealed, but the Court of Appeals remanded the matter "with instructions that the case be set forthwith and heard on its merits," stating:

> The issue in this case is not what might be a desirable Detroit school plan, but *whether or not there are constitutional violations* in the school system as presently operated, *and if so, what relief is necessary* to avoid further impairment of constitutional rights. 438 F.2d 945, 946 (6th Cir. 1971) (emphasis supplied).

2. Hearings on Constitutional Violation

On April 6, 1971, as directed, the District Court began the reception of proof on the subject of constitutional violation. For 41 trial days, aided by hundreds of demonstrative exhibits and thousands of pages of factual and expert testimony, the Court supervised a full and painstaking inquiry into the forces and agencies which contributed to establishment of the by-now obvious pattern of racial segregation in the Detroit public schools.[9] This inquiry was more comprehensive and probed more deeply into the causes of existing school segregation than any of which plaintiffs' counsel are aware.

The evidence revealed a long history, both before and after *Brown*,[10] of purposeful official action systematically facilitating Detroit's extensive pupil segregation. Virtually all of the classic segregating techniques which have been judicially identified, by this Court in *Keyes*[11] and elsewhere, were employed or sanctioned by Detroit and State school officials during the two decades from 1950 to 1970: purposeful rescission of recent desegregation efforts; racial gerrymandering of attendance zones, feeder patterns and grade structures to maximize school segregation and purposefully incorporate precise residential patterns of segregation in schools; intact busing; in-school segregation; racially selective placement of optional attendance areas

---

[9] In 1960-61, of 251 Detroit regular (K-12) public schools, 171 had student enrollments 90% or more one race (71 black, 100 white); 61% of the system's 126,278 black students were assigned to the virtually all-black schools. In 1970-71 (the school year in progress when the trial on the merits began), of 282 Detroit regular public schools, 202 had student enrollments 90% or more one race (69 white, 133 black); 74.9% of the 177,079 black students were assigned to the virtually all-black schools. (Va 31-33).

[10] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

[11] *Keyes* v. *School Dist. No. 1, Denver*, 413 U.S. 129, 37 L.Ed.2d 548 (1973).

or dual overlapping zones; discriminatory allocation of faculty to mirror pupil racial composition of schools;[11] and persistent and intentional segregative construction (both of new schools and of enlargements to old ones) and site location practices. (See, e.g., Ia 133-171; IIa 1-8; IIa 82-111; IIa 111-159; IIa 160-312; IIIa 1-18; IIIa 18-53; IIIa 53-59; IIIa 60-72; IIIa 72-73; IIIa 75-81; IIIa 97-153; IIIa 158-206; IIIa 216-230; IIIa 237-244; IIIa 244-246; Va 24-31; Va 31-34; Va 35-41; Va 42; Va 43; Va 44-47; Va 48-68; Va 102-104; Va 181-197; P.X. 63; P.X. 109 A-Q;

---

[11] The District Court found, however, that by 1970—and in large measure at the behest of the defendant Detroit Federation of Teachers and then Detroit Board's Assistant Superintendent McCutcheon in charge of personnel—the Detroit public schools were engaged in a significant program designed to overcome past racial faculty assignment patterns, and that because this program showed promise of achieving its goals within Detroit, injunctive relief was not required as to faculty allocation in the city schools. (J. 28a-J. 32a). Such findings, however, with respect to faculty only demonstrate more clearly the high burden of proof imposed by the District Court on plaintiffs at trial; for it was uncontroverted that white Detroit areas were openly hostile to black faculty members prior to 1960 and the Detroit Board accommodated this racial hostility by refusing to assign black teachers into those predominantly white schools until the whites were willing (Tr. 45-49, IIIa 59; R. 2548-2549). As a result few black teachers and administrators were assigned to serve white student bodies and black teachers and administrators were assigned generally to black schools. Staff racial composition mirrored pupil racial composition, thereby further identifying schools as "black" or "white" during critical periods of the record (e.g., P.X. 100 A-J; P.X. 165 A-C, P.X. 154 A-C J.X. FFFF; P.X. 166, P.X. 3 at pp. 73-79, Va 48-68). Moreover, the availability of positions to whites in virtually all white suburban schools coupled with an acute shortage in the supply of teachers made recruitment and assignment of white teachers to black schools difficult (e.g., R. 4471-4475; J. 31a); this further exacerbated the racial pattern in the allocation of faculty. Although this racial pattern in the allocation of faculty ameliorated somewhat after 1965, the pattern still persisted at the time of trial so that pupil racial composition of schools still could be determined solely by reference to the faculty racial composition. As admitted by then Deputy Superintendent Johnson, "the pattern . . . is the result of discrimination." (IIIa 223). (E.g., Ia 135-140; Va 44-45; P.X. 100; P.X. 165, P.X. 154; IIa 276-278; D.X. FFF).

P.X. 16 A-D; P.X. 136 A-C; P.X. 137 A-C; P.X. 147-149; P.X. 153-153B; P.X. 154 A-C; J.X. FFFF; P.X. 173.) All of these *de jure* devices operated in lockstep with the extensive residential segregation, itself the product of public and private racial discrimination, to further exacerbate the school segregation and result in the intentional confinement of the growing numbers of Detroit black children to an expanding core of virtually all-black schools immediately surrounded by virtually all-white schools. (See, e.g., Ia 156-164; IIa 9-19; IIa 19-22; IIa 22, IIa 45-51; IIa 23-28; IIa 28-45; IIa 51-60; IIa 60-64; IIa 64-69; IIa 69-72; IIa 176-273, 296-307; IIIa 60-72; IIIa 73-74; IIIa 64, 66-70; IIIa 206; Va 22; Va 24-30; Va 69-86, P.X. 183 A-G; Va 21-23; Va 5-11; P.X. 38; P.X. 48A; P.X. 57; P.X. 60; P.X. 16 A-D; P.X. 109 A-Q; P.X. 184; Va 89-90; P.X. 181; P.X. 182; P.X. 189; Ex. P.M. 13-15; Ex. M. 5 (Exhibit B); Ex. M. 14).

Confronted by the evidence, the District Court concluded, in its September 27, 1971 opinion, 338 F. Supp. 582 (17a-39a), that although certain public and private non-school forces of discrimination had also contributed to the creation of Detroit's highly segregated school system, pervasive and purposeful discriminatory action at the state level and by Detroit defendants, relating directly to the public schools, was a significant causal factor.[13] Therefore,

[13] The District Court, like this Court in *Swann* and *Keyes*, did consider the interaction between residential and school segregation. The residential segregation throughout the metropolitan area was shown by the evidence, and found by the District Court, to be, "in the main, the result of past and present practices and customs of racial discrimination, both public and private . . ." and *not* the result of the racially unrestricted choice of black citizens and economic factors (23a). The segregative actions of state and Detroit school authorities (especially with respect to school construction) and the environment for segregation fostered by the dual system of schooling, i.e., the expanding black core immediately surrounded by the white ring, was also found to interact with and to contribute

the District Court held, the Fourteenth Amendment required "root and branch" elimination of the unlawful school segregation and its effects.

3. Remedial Proceedings

a. The Practicalities of the Local Situation

The evidence at the violation hearing focused primarily on the Detroit public schools, where over 132,000 black children were assigned to a core of virtually all-black schools, identified as black by official state action. However, in exploring how these black schools were created and maintained, and how their resulting state-imposed racial identity could be effectively removed, the proof of the pattern of state action affecting school segregation—

---

substantially to this residential segregation throughout the Detroit area. This, in turn, further exacerbated school segregation. (J. 23a-24a, 26a-28a, 35a; J. 77a-78a, 87a-88a, 93a-94a. See also J. 144a-157a, 159a, 172a). Compare the similar relationship previously noted by this Court in *Swann*, 402 U.S. at 20-22, and *Keyes*, 37 L.Ed.2d at 559-560, 565. As stated by the District Court "on the record there can be no other finding." (J. 23a). Thus unlike *Bradley* v. *School Bd. of the City of Richmond*, 462 F.2d 1058, 1066 (4th Cir. 1972), and contrary to petitioners' assertions (e.g., Grosse Pointe Brief 38), the District Court *did* take evidence and make findings, supported by overwhelming proof, as to the racially discriminatory causes of residential segregation in the metropolitan area and the important contribution to that condition of the *de jure* actions of school authorities. (In Argument, *infra*, pp. 43-49, we will analyze the factual and legal implications of these findings.)

[14] As a dramatic example, consider the Higginbothom community in Detroit and the adjacent Carver School District. The Higginbothom community had been built up as a black "pocket" by temporary World War II housing, designated for black occupancy, on the outskirts of Detroit and extended beyond the city limits into Oakland County and the old, almost all-black Carver School District. The boundaries for the newly constructed black Higginbothom school in Detroit were created and maintained to coincide with the precise perimeters of the black "pocket" in Detroit, which perimeters were also marked both by an actual cement wall built by the white neighbors *and* the boundaries of the adjacent all white schools

just as did the acts themselves[14]—extended beyond the geographical limits of Detroit.[15] The evidence compelled viewing the Detroit Public Schools as part of a State system of public education, not a detached island of unremediable segregation.

---

imposed by school authorities to cordon off the area. To the immediate North of the Higginbothom school, the black "pocket" extending outside Detroit was contained within the small, all-black Carver School District. That black district lacked high school facilities. The state and Detroit school defendants accommodated these black suburban high school pupils for years, from at least 1948 through 1960, by busing them past or away from several closer white schools, across school district lines, to a virtually all-black high school in the inner core of the city. These black students were not housed in suburban high schools but were bused across school district lines, for the purpose of segregation, thereby further marking the neighboring suburban schools as "white" and the inner schools as "black." (The Carver School District was finally split in two and merged into the Ferndale and Oak Park School Districts. Yet, at the elementary level, all the suburban students in this black "pocket" continued to attend two virtually all-black suburban schools. The Court of Appeals in another action upheld the HEW finding and withholding of federal funds with respect to such vestige of state-imposed segregation, see *School Dist. of Ferndale* v. *HEW*, No. 72-1512 (6th Cir., March 1, 1973). (J. 26a; J. 80a, 96a; J. 137a-139a, 152a.) (See also, e.g., Ia 157, 162; I.R. 163; P.X. 78a; P.X. 19 p. 71; 11a 109-110; 11a 131; IIIa 206; Va 181-182; Va 186; P.X. 184; Va 89-90.) That the state defendants are ultimately responsible for this patent act of segregation from their general supervisory powers is clear (e.g., J. 36a-38a). Their particular responsibility for this violation and acquiescence in it is equally clear: they have supervisory responsibility for regulation of all aspects of school busing, including the routing buses. (J. 36a; M.C.L.A. 388.1010(c)).

[15] This evidence of effective discrimination along or beyond the DSD borders ran only against the State defendants—the chief state school officer, the State Board of Education which is charged with general supervision of public education, the chief state legal officer and the State's chief executive—and Detroit defendants and *not* against any suburban school district, its conduct, or the establishment of its boundaries, as specifically noted by the District Court. (J. 60a). The evidence presented related primarily to (1) the State's policies and practices effecting segregation within and of the Detroit public schools vis-a-vis its suburban neighbors with respect to Act 48, school construction, merger of districts, pupil

The proof showed that in practical terms there are now, and for years have been, two sets of schools in the Detroit area: one virtually all-black, expanding core in the DSD, surrounded by another virtually all-white ring beginning in some areas at the border of the DSD but everywhere extending throughout the suburban area beyond the geographical limits of the DSD. By 1970 the black core in the DSD contained some 132,700 black pupils in 133 schools more than 90% black, made racially identifiable by pervasive discriminatory actions and practices of state and Detroit defendants. In stark contrast in the school districts in the metropolitan area surrounding[16] the Detroit public schools, between 1950 and 1969 over 400,000 new pupil spaces were constructed in school districts now serving less than 2% black student bodies (Exs. P. M. 14; P. M. 15). By 1970 these suburban areas[17] assigned a student

---

assignment across school district boundaries for the purpose of segregation, faculty allocation, and disparity of bonding authority and transportation funding and (2) to actions by Detroit and state defendants which not only contained black youngsters in designated Detroit schools but which had the reciprocal effect of further earmarking the surrounding ring of schools—in Detroit and the suburbs—as white. (J. 26a, 28a, 38a; J. 77a-78a, 87a-88a, 93a-94a; J. 144a-157a). Contrary to the Petitioners' assertions, the evidence of state law and practice showed that school districts in the Detroit area were *not* separate, identifiable, and distinct, except with respect to race. (See, e.g., J. 23a-24a; J. 36a-38a; J. 50a; J. 77a-81a; J. 87a-88a; J. 151a-157a; 165a-173a).

[16] Hamtramck (28.7% black) and Highland Park (85.1% black) are surrounded by the Detroit School District.

[17] There are also small, long-established concentrations of black population outside Detroit which are located in Ecorse, River Rouge, Inkster, Westland, the old Carver School District (Ferndale and Oak Park), and Pontiac. As within the DSD, the black and white pupils within these districts also remained substantially segregated in 1970-71. (E.g., P.X. 181, 182, 184; Ex. P. M. 12; Va. 111-115). Such a systematically segregated result is entirely consistent with the history of *de jure* segregation throughout the State. Contrary to Petitioners' assertions that the State has enjoyed a long "unitary" history, this case is *not* an isolated exception; at least the

population of 625,746 pupils, 620,272 (99.13%) of whom were white, to virtually all-white schools. Within the context of the segregatory housing market and environment for segregation fostered by the dual system of schooling, this massive suburban school construction contributed to the migration of whites from the city to, and the location of whites immigrating to the Detroit area in, the suburbs. In turn, this had a reciprocal effect on the racial composition of the Detroit Public Schools which "has been substantial". (J. 78a). Throughout the metropolitan area, faculties mirrored the racial composition of the student bodies of schools, thereby further earmarking them as "white" or "black" schools. For example, within Detroit, 41.8% of the teachers were black; in the suburban areas above with less than 1% black pupils, only 0.4% of the faculty were black. (Exs. P.M. 13; P.M. 18).

Finally, the evidence indicated that absent appropriate judicial intervention, this unmistakable pattern of school segregation would continue: In the environment for segregation created by the long history of *de jure* school segregation and the interrelated, pervasive and enforced residential segregation, the state-imposed core of black school population within the DSD would continue to expand

---

six other school districts in the State subjected to judicial scrutiny have been found guilty of pervasive racial discrimination with respect to the assignment of pupils or staff or both. *Davis* v. *Sch. Dist. of City of Pontiac*, 309 F.Supp. 734 (E.D. Mich), *aff'd*, 443 F.2d 573 (6th Cir. 1971); *Oliver* v. *Kalamazoo*, 346 F.Supp. 766 (W.D. Mich) *aff'd*, 418 F.2d 635 (6th Cir. 1971), on remand —— F.Supp. —— (K-98-71, Oct. 4, 1973), *NAACP and Taylor* v. *Lansing*, —— F.Supp. —— (W.D. Mich. 1973); *School Dist. of Ferndale* v. *HEW*, No. 72-1512 (6th Cir., March 1, 1973); *Berry* v. *School Dist. of the City of Benton Harbor*, (C.A. No. 9, W.D. Mich. Feb. 3, 1970) (oral opinion); *Higgins* v. *Grand Rapids Bd. of Ed.*, —— F.Supp. —— (C.A. 6386) (W.D. Mich. 1973). Thus the State's express promises of a racially non-discriminatory system of public schooling have long been denied to the vast majority of black children throughout the State.

right up to the borders of the DSD and within a relatively short time *all* of Detroit's schools were likely to have nearly all-black student bodies, all still surrounded by a ring of virtually all-white schools.[18] (J. 20a; J. 23a-24a; 54-55a).

b. The District Court's Guidance by Settled Equitable Principles and Its Order to Submit Plans.

It was in the light of this factual background, then, that the District Court set about the difficult task of devising an effective remedy for the extensive constitutional violation and resulting massive school segregation which it had found. From the beginning of its search for an appropriate remedy to its final opinion on remedy, the District Court was guided by the prior rulings of this Court and by settled equitable principles in "grappling with the flinty, intractable realities" of eliminating all vestiges of state-imposed segregation. (J. 61a quoting *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 US 1, 6). In its first colloquy with counsel concerning remedy, on October 5, 1971, the district judge made clear that *Davis*[19] and *Brown II*[20] established the contours of the future proceedings in the case:

> I want to make it plain I have no preconceived notions about the solutions or remedies which will be required

---

[18] Among the other practicalities of the situation confronted by the District Court at this point, then, were the boundaries of the DSD and the existence of other school districts, both local and intermediate. The District Court's determinations with respect thereto are so much the primary subject of this Court's review that they will be set forth and analyzed in Argument, *infra*. (See also Nature of Review, *supra* at 5-8).

[19] *Davis* v. *Board of School Comm'rs of Mobile*, 402 US at 37 (1971).

[20] *Brown* v. *Board of Education*, 349 US at 299 (1955).

here. Of course, the primary and basic and fundamental responsibility is that of the school authorities. As Chief Justice Burger said in the recent case of *Davis* v. *Board of School Commissioners*:

> —school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.

Because these cases arise under different local conditions and involve a variety of local problems their remedies likewise will require attention to the specific case. It is for that reason that the Court has repeatedly said, the Supreme Court, that each case must be judged by itself in its own peculiar facts. (J. 42a).[21]

---

[21] Petitioners' use of the District Court's remark at this same colloquy with respect to "social goals" and "law as a lever" are taken wholly out of context. (E.g., State Brief 77-78.) Where petitioners thereby imply that the District Court was motivated by a "social goal" to accomplish "racial balance" and "majority white schools," the District Court's remarks were only a cautious statement of constitutional principles, defendants' responsibility initially to come forward with a plan promptly, and the practical problems which have been experienced in implementing constitutionally mandated desegregation in the face of white community hostility. As this Court well knows, the historic course of righting the constitutional wrong of state-imposed school segregation has not been easy and has been made more difficult by the recalcitrance of school authorities and white communities over time. See *Swann*, 402 U.S. at 13. Read in context then, the District Court's remarks about the "social" difficulties inherent in such judicial intervention were an admonition to plaintiffs that the *Alexander* command of "now" be understood in light of the practical difficulties of devising and implementing a plan to provide complete relief. The only conceivable error in such statement is its suggestion that delay beyond the limits mandated by *Alexander* and *Carter* might be required in view of the practicalities of the local situation. *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 290 (1970).

In its last opinion on remedy, the District Court reiterated the constitutional basis for its action.

> The task before this court, therefore, is now, and, since September 27, 1971, has always been, how to desegregate the Detroit Public Schools.
>
> • • •
>
> [T]he primary objective before us was [and is] to develop and implement a plan which attempts to 'achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.[21] (J. 60a).

Put simply, the District Court was required to consider what was necessary to disestablish the state-imposed black core, now and hereafter, in the context of the nature of the violation and the practicalities of the local situation.

Based on these equitable principles and in order to evaluate all feasible alternative desegregation techniques, at a pre-trial conference on October 5, 1971, and by written order on November 5, 1971, the District Court directed that Detroit school officials submit a plan limited to the DSD within sixty days and also that state defendants recommend a plan not limited to the existing boundaries of the DSD—a "metropolitan" plan—within 120 days (J. 43a, J. 46a-47a).[22]

---

[21] In its two intervening rulings on remedy, the District Court steadfastly applied these legal standards. (See J. 48a; J. 53a.) Thus, throughout the remedial proceedings the District Court sought "to assess the effectiveness of proposed plans of desegregation in the light of circumstances present and the available alternatives; and to choose the alternative or alternatives which promise realistically to work now and hereafter to produce the maximum actual desegregation." (J. 50a).

[22] The State and Detroit defendants sought to overturn the District Court's ruling on violation by appealing from its orders requiring submission of plans; the Court of Appeals held this procedure to be premature. 468 F.2d 902, *cert. denied*, 409 U.S. 844 (1972).

c. The Procedural Status of Suburban Intervenors.

At the same time the District Court considered again the motion of the original intervening defendant white homeowners group to join all 86 school districts in the Detroit metropolitan area. (In its September 25, 1971 Ruling on Segregation the District Court held decision on the motion in abeyance pending submission of actual plans of desegregation by the parties, which might establish more particularly the perimeters of relief and the school districts involved (J. 38a-39a).) In the pre-trial conference on October 5, 1971 on remedial proceedings, the District Court again indicated its desire to allow affected school districts an opportunity to be heard prior to implementation of any final plan but was uncertain how the practical mechanics should be handled in view of the posture of the proceedings, the uncertainty as to which school districts might be affected and to what degree, the number of the potential additional litigants, and the need to remedy the constitutional violation "with some dispatch" (J. 44a). (As *no* actual plan of "metropolitan" desegregation has ever been before the District Court, this Court simply cannot know how the District Court would have resolved the issue. The original motion of the intervening defendants was subsequently withdrawn, but state defendants and then the suburban intervenors continued to press the issue).

Despite the public notoriety of this case, only 43 of the suburban school districts chose to file motions to intervene and then only between February 9 and 18, 1972, many months after the words "cross-district busing" first canonaded around the State and several months after the District Court had set a schedule for the filing of remedial plans and objections thereto. (J. 43a; J. 47a; Ia 4-5; Ia 185, 189, 192, 196). On March 15, 1972, the District Court granted these motions to intervene, as well as the motion to inter-

vene earlier filed by a group of white suburbanites also seeking to contain any possible desegregation within the geographic limits of the DSD. (At the same time the District Court continued to defer ruling on the motion to join all 86 school districts). In granting these motions, the District Court did place certain restrictions on the intervenors' conduct in future proceedings in the interests both of making judicial administration of further hearings among the numerous parties possible and of insuring that plaintiffs' right to immediate relief under *Alexander* would not be further forfeited. (Ia 204.) At the first day of the hearings on metropolitan relief the District Court made clear, however, that these limitations would give way to the interests of justice upon showing.[24]

d. Hearings and Decision on Plans Limited to the DSD.

In response to the District Court's order, the Detroit Defendants submitted two DSD "free choice plans" neither of which even purported to be plans of actual desegregation; the Detroit Board announced that actual desegregation would require approaches extending beyond the geographical limits of the DSD. The plaintiffs, therefore, submitted a plan of pupil reassignment limited to the DSD borders to permit full evaluation of the available alterna-

---

[24] The District Court stated at the opening of the hearings on metropolitan relief:

> Some of the newly intervening parties have filed objections to the conditions of intervention which I have not given full consideration to. Presently, I believe all the Court need say is that the conditions are subject to modification and change as justice may require as the proceedings progress. (IVa 142).

Throughout the hearing the District Court modified the restrictions to permit cross-examination by all counsel and even keep the record open for submission of evidence on tangential issues. (E.g., IVa 143). In Argument, *infra*, we will show how the District Court did not deny to any person any procedural right secured by the United States Constitution.

tives. After hearings, from March 14 through March 21, 1972, at which suburban school district intervenors did not appear, the District Court concluded that, in view of the violation and its far-reaching results and the practicalities of the local situation, a plan of desegregation limited to the DSD would be ineffective: it would maintain the state-imposed containment of black children to a core of predominantly black schools extending right up to the borders of the DSD, still walled off from a ring of virtually all-white schools and would lead directly to the creation of a virtually all-black school district immediately surrounded by virtually all-white schools.[25] (J. 48a et seq., J. 53a et seq., 87a-88a). Such a "remedy" held no promise for disestablishing the present and expanding, state-imposed core of black schools now, even less promise hereafter.

e. The Hearings and Decision on "Metropolitan" Plans.

The hearings on "metropolitan" plans commenced on March 28, 1972, and continued through April 14, 1972. The state defendants, however, failed to submit any plan of actual desegregation extending beyond the borders of the DSD. They chose instead to submit six "plans" "without recommendation or preference" (J. 62a) and without record support (J. 64a). Four proposed concepts alternative to maximum actual desegregation; a fifth described a statistical method of determining the number of transfers involved in achieving any particular racial mix; and a sixth discussed, primarily, new governance and administrative structures for any larger area of actual pupil desegregation and also proposed a particular area for initial pupil de-

[25] The District Court rejected the Detroit Board "free choice" proposals as not only wholly ineffective, but also independently unconstitutional; in contrast the District Court found that plaintiffs' plan, despite its constitutional ineffectiveness, would accomplish more desegregation than the Detroit Board proposals and than currently existed in the DSD. (J. 54a-57a).

segregation. The state defendants filed objections to the non-plans they themselves submitted, based upon self-serving assertions of impotence. At the hearings on these "plans" the state defendants steadfastly refused to meet their burden to explore and develop the relative promise of alternative "metropolitan" proposals for desegregation. All this constituted a direct refusal by state defendants to assist the District Court in defining even the area and further planning necessary to develop an effective plan. (J. 62a-64a.)[26]

The Detroit Board and intervening Detroit home-owners group proposed alternative perimeters for the area necessary and practicable effectively to eliminate the official segregation of the Detroit public schools. Plaintiffs thereafter submitted a modification of the three perimeters already proposed. (J. 65a.)

As a result of the state defendants' default in failing to submit an actual and complete desegregation plan, the initial hearings on "metropolitan" relief were necessarily limited primarily to consideration of the general contours of a plan, particularly the perimeter for actual pupil desegregation and how to proceed with further planning. (J. 61a-64a.) Six months after the finding of violation and order to defendant school authorities to submit actual plans, therefore, the District Court was limited to undertaking to determine a feasible method and tentative guidelines to permit preparation of such an actual plan of desegregation at last to begin in earnest. *Cf. Swann*, 402 U.S. at 24-25. After hearing, and the parties' submission of proposed findings of fact and conclusions of law, the

[26] The newly intervening suburban defendants rather than assisting the District Court in considering the alternatives available and suggesting how future planning should proceed chose instead to press their views that separate schools were preferable. (J. 64a).

District Court issued an order, July 14, 1972, (1) setting the contours for actual desegregation planning pending hearing on a completed model,[27] (2) establishing a panel

---

[27] The District Court specifically rejected the perimeter proposed by state defendants because on the record evidence its only justification was "a desire to achieve an arbitrary racial ratio." (J. 66a). Such finding is just one of the many examples which refute petitioners' charge that the District Judge was motivated by a non-judicial social desire to achieve "racial balance" and "majority white schools." Other examples include the District Court's (1) findings that Detroit defendants' persistent refusal to assign white children to predominantly black schools and purported attempts at "one-way" desegregation (transfers of only blacks to white schools) were among the constitutional violations (J. 26a); (2) findings that the plan of actual desegregation limited to the DSD "would accomplish more desegregation than now obtains in the system". (J. 54a); and (3) rejection—on the basis of the precise commands of *Brown*, *Brunson* and *Swann*—of petitioners' assertion of just such "social policy" considerations in the district court as a justification for limiting desegregation (J. 61a, 89a). The wonder, then, is that petitioners cite Judge Sobeloff's compelling concurring opinion in *Brunson* v. *Bd. of Trustees*, 429 F.2d 820 (4th Cir. 1970), in support of their argument that the District Judge was a racist motivated by a belief in black inferiority to order desegregation beyond the DSD to achieve all "majority white" schools. No individual could have more strongly agreed with Judge Sobeloff's interpretation of *Brown's* requirement to disestablish completely the state-imposed black core, and only that, than Judge Roth:

> Insofar as pupil assignments are concerned, the system of public schooling in every state must be operated in a racially non-discriminatory, unified fashion; until that objective is met, the very system of public schooling constitutes an invidious racial classification. (J. 86a).
>
> From the initial ruling on September 27, 1971, to this day, the basis of the proceedings has been and remains the violation: de jure school segregation. Since *Brown* v. *Board of Education* the Supreme Court has consistently held that the remedy for such illegal segregation is desegregation. The racial history of this country is writ large by constitutional adjudication from *Dred Scott* v. *Sandford* to *Plessy* v. *Ferguson* to *Brown*. The message in *Brown* was simple: The Fourteenth Amendment was to be applied full force in public schooling. The Court held that "state-imposed" school segregation immeasurably taints the education received by all children in the public schools; perpetuates racial discrimina-

of experts to develop a plan for pupil desegregation, (2) directing state defendants to consider administrative practicalities associated with any eventual desegregation order, and (4) setting a schedule for further proceedings to consider any plans and recommendations made by the court-appointed panel and the state defendants and to permit the parties an opportunity to present objections and alternatives.[28] (J. 97a-105a.)

---

tion and a history of public action attaching a badge of inferiority to the black race in a public forum which importantly shapes the minds and hearts of succeeding generations of our young people; and amounts to an invidious racial classification. Since *Brown* the Supreme Court has consistently, and with increasing force, held that the remedy upon finding de jure segregation is prompt and maximum actual desegregation of the public schools by all reasonable, feasible, and practicable means available. This court finds that there is nothing in the law, wisdom, or facts, and the particular circumstances and arguments presented in this case which suggest anything except the [illegible] of these principles in both fact and law. The task before this court, therefore, is now, and, since September 27, 1971, has always been, how to desegregate the Detroit public schools. . . . (J. 60-61a)

Having been told by the lower courts that naked "social policy" concerns yield to constitutional commands and may not limit desegregation, petitioners dare to argue in this Court that the lower courts were motivated by racist "social goals" rather than the commands of the Constitution.

[28] The perimeter approved by the District Court for further planning for actual desegregation was premised on several criteria including reasonable time and distance limitations, eliminating the racial identifiability of the state-imposed black core, the actual community of interest in the Detroit area, existing school district boundaries, and long range stability (J. 62a-70a). The District Court was able to reduce the perimeter from some of the more expansive proposals of defendants by requiring state defendants to examine and limit new classroom construction outside the desegregation area which might affect the stability of the ultimate plan. (J. 72a). *Cf. Kelley* v. *Metropolitan County Bd. of Ed.*, Civ. No. 2094 (M.D. Tenn., June 28, 1971), *aff'd*, 463 F.2d 732 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972). Finally, the District Court ordered that further planning proceed on a division of the desegregation area into general clusters of schools, each

Thereafter, upon recommendation of the court-appointed panel and after hearing, the District Court on July 11, 1972 ordered the purchase of 295 buses, necessary to implement any of the "metropolitan" or "Detroit only" proposals then before the Court for the actual desegregation of the Detroit Public Schools (J. 106-107a). Upon the representation by the State defendants that they would not disburse funds for these buses, the District Court at the same time joined the State Treasurer as a defendant pursuant to Rules 19 and 21, Fed. R. Civ. P. (Ia 263-264). Compare *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964).

4. Appellate Proceedings

Following emergency appeals from these rulings, the Court of Appeals stayed the order directing purchase of

---

roughly approximating the racial composition of the desegregation area (J. 70a-81a). Within each cluster, then, planning for the actual disestablishment of the state-imposed core of black schools could continue almost independently. This would make planning for each smaller cluster considerably easier than in many plans previously drawn throughout the country. The Court also instructed that further planning proceed on the basis of attempting within clusters to avoid a pattern of schools of substantially disproportionate racial composition, subject to reasonable time and distance limitations as they actually developed (J. 101a-102a). Such planning order is precisely the type of "starting point" authorized by *Swann*, 402 U.S. at 25, to permit actual development of a pupil assignment plan. And the District Court invited petitioners to submit alternatives and objections, or to argue that particular assignments were not necessary to the elimination of the state-imposed black core now and hereafter, upon submission of an actual plan. (J. 105a). At that point petitioners will have the opportunity to show that particular pupil assignments proposed were unnecessary and unrelated to the disestablishment of the state-imposed core of black schools. *See Swann*, 402 U.S. at 26. Thus state petitioners' argument (State Brief, 74-77) that such unnecessary pupil assignments were ordered by the District Court is, to say the least, premature and wholly unfair to the District Court which has not yet even had an opportunity to rule on the issue.

transportation equipment pending entry by the District Court of a final desegregation order or until certification by the District Court of an appealable question as provided by 28 U.S.C. §1292(b). (See J. 113a). On July 19, 1972 the District Court certified his prior rulings under 28 U.S.C. 1292(b) and made a determination of finality under Rule 54(b), Fed. R. Civ. P. (Ia 265-266). The Court of Appeals immediately granted the interlocutory appeal on an emergency basis and stayed all further proceedings in the District Court, except planning, pending appeal. (113a).[29]

Subsequently, pending the appeals, the panel and state defendants filed reports on their planning. (Ia 268, Ia 271, Ia 288). Of particular note, the State defendants' report on administration of any eventual desegregation plan recommended that, at least on an interim basis, existing school districts be maintained with pupil desegregation to be accomplished by contract between school districts, as already authorized under state law.[30] (Ia 268-270). State defendants also recommended that any eventual alteration

---

[29] Immediately after the District Court's Ruling on Desegregation Area and Development of Plan, three other suburban school districts chose to apply to the Court of Appeals for writs of mandamus or prohibition against Judge Roth. The Court of Appeals denied the applications without prejudice to the school districts' right to intervene on July 17, 1972 and August 7, 1972. On February 27, 1973, this Court denied review of that decision without prejudice to the right of the School Districts to file application to intervene in the present action. (IIIa). These three suburban school districts chose not to avail themselves of the opportunity to intervene in the District Court or in the Court of Appeals. The remaining suburban school districts chose just to sit tight. (See Argument, *infra* pp. 61-78, for a discussion of how none of these districts were denied any procedural rights guaranteed to them by the United States Constitution.)

[30] The District Court had already approved use of such an approach in its Findings of Fact and Conclusions of Law in Support of Ruling on Desegregation Area and Development of a Plan

of the school districts' boundaries and reorganization of state, intermediate and local school authority agencies and functions should be left to the legislature and the people.[31] (Ia 278, et. seq.).

On June 12, 1973, after briefs, hearing and decision by a panel of judges, and grant of petitioners' motions for rehearing *en banc*, the Court of Appeals sitting *en banc* affirmed the District Court's findings of a pervasive violation[32] and the inadequacy of relief limited to the DSD,

---

(J. 80a-81a). Such utilization of state law to provide or assist in providing a remedy for violation of civil rights is authorized by 42 U.S.C. §1988, which makes "State law responsive to the need whenever a federal right is impaired." *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 240 (1969).

[31] On appeal, plaintiffs supported these recommendations as a workable method of proceeding to accomplish complete relief from the constitutional violation with as little intrusion as possible into the State's existing internal structures for administering public education.

[32] Perhaps the most glaring non-sequitur in all of petitioners' briefs is the extensive quotation of the Detroit Board's brief, as appellant in the Court of Appeals, as some kind of authority for the proposition that the violations found and of record in this case were trifling. (Grosse Pointe Brief 16-18). The Detroit Board vigorously defended this position with argument and evidence in the District Court and then played out this approach in its appeal and presentation to the Court of Appeals. Based on the entire and extensive record evidence, however, this proposition was first squarely rejected by the District Court, which found that the violations were pervasive, purposeful and substantially contributed to the existing conditions of segregation. (J. 23a-33a). (Indeed at trial the Detroit Board required plaintiffs to cross every "t" and dot every "i"; but when all the evidence was in, plaintiffs had spelled-out, beyond peradventure, "state-imposed segregation.") On appeal, after carefully reviewing the evidence, the Court of Appeals, *en banc*, affirmed the District Court's findings that the *de jure* actions of the State of Michigan and Detroit defendants were pervasive, purposeful and causally related to the imposition of massive school segregation on plaintiff black children from the beginning of the record evidence to date. (J. 157a). Compared to the careful judicial considerations of the extensive record evidence and express rulings of the District Court and Court of Appeals

affirmed the propriety of considering relief extending beyond the geographic borders of the DSD, but vacated for procedural reasons the Ruling on Desegregation Area and Development of a Plan (except for authorizing the court-appointed panel to proceed with its studies). (J.a 110a et. seq.). The Court of Appeals remanded with guidelines for accomplishing relief but expressed no view on the vacated remedial rulings with respect to the tentative perimeter for a desegregation area and all other particulars. (J. 178a). Thus any semblance of even the tentative outlines of a remedial plan were thereby wholly eliminated. In remanding, however, the Court of Appeals did (1) adopt the parties' suggestion to give the legislature the opportunity to act prior to any restructuring or alteration of existing school districts and school district lines; (2) approve the principle that desegregation extending beyond the geographic limits of the Detroit School District was required to remedy, now and hereafter, the unconstitutional school segregation and its effects disclosed by the record, taking into account all the practicalities of the local situation; and (3) hold that any suburban school district to be affected by any plan must be given an opportunity to be heard prior to implementation.

On review, therefore, there is simply no plan of desegregation before this Court.[32] The only substantive issue is whether the boundaries of the DSD can be crossed at all

---

in this case, we respectfully suggest that the petitioners' citation of a contrary argument in a brief of the appellant Detroit Board is entitled to little weight.

[32] About all that is clear is that if the decision of the Court of Appeals is affirmed any eventual desegregation plan will utilize, at least on an interim basis, existing school district entities and transfers accomplished by contract unless the legislature chooses

in any fashion to remedy the violation, taking into account the entire local situation found, in the sound exercise of the District Court's equitable discretion.[34]

State and suburban school district defendants petitioned this Court for Writs of Certiorari to review the *en banc* decision of the Court of Appeals with respect to (1) the

---

to establish a new and different administrative framework for relief. The difficulty with this Court's review of the historic, substantive constitutional issue presented in this interlocutory stage of proceedings is apparent. See Memorandum in Opposition to Petitions for Writs of Certiorari of Respondents Ronald Bradley et al., *passim*. We continue to adhere to the views set forth in that Memorandum and respectfully suggest that certiorari to review this case was improvidently granted at this juncture.

[34] Thus this case presents no issues of "massive busing", for "walk-in" desegregation is possible across the borders of the DSD between all-black Detroit schools and contiguous, all-white suburban schools. The issue is whether even that "walk-in" desegregation is foreclosed by the happenstance of a state-created border between subordinate school districts which petitioners now urge should stand both as a barrier to disestablishment of the state-created black core and as the ultimate protection for the reciprocal all-white ring. On the proof of record in this case, there is not the slightest shadow of a doubt that at least these "walk-in schools" would be ordered to desegregate if they were not separated by a school district line. See *Keyes* v. *School District No. 1*, 37 L.Ed. 2d 548, 572-573, 581 (separate opinion of Powell, J.)

We also note, however, that petitioners' statements about busing to accomplish desegregation misrepresent the facts of record. Even assuming *arguendo* that the District Court's vacated Ruling on Desegregation Area were to be fully implemented, with respect to transportation it would be supported by the following factors: (1) this case does not involve turning a non-transportation system into a transportation system; (2) 42% to 52% of the pupils in suburban districts which receive state reimbursement are now bused to school (Ex. M4, pp. 3134) and 35% to 40% of all students are bused to school in the state (Va 206); (3) these figures compare with the desegregation panel's estimate that ultimatly 37% of the pupils in the "desegregation area" will require transportation; (4) school bus transportation is a much safer and more convenient means of getting children to school, and on time, than either car or walking, and this is especially true for young children (Va 213-214; IVa 15; Hearings re Detroit-Only Plans Tr.

so-called "state" violation; (2) any desegregation in this case not limited to the borders of the Detroit School District, and (3) the failure to join all suburban school districts which might be affected by any remedial plan at the outset of the litigation. This Court granted certiorari so to review the case on November 19, 1973.

5. Proceedings on Remand

Pursuant to the instructions of the Court of Appeals, plaintiffs filed an amended complaint to conform to the evidence and moved to add all school districts, their boards and executive officers, who might conceivably be affected by any plan in any fashion. (Ia 291). The District Court ordered these parties added pursuant to Rules 19 and 21, F. R. Civ. P. (Ia 300-302). Many of the defendants joined, as well as those already parties to this action, have filed answers. In addition the defendant Attorney General formally transmitted the *en banc* opinion of the Court of

---

333-334); (5) over 300,000 children in the tri-county area are now bused to school (Va 116-122), about the same number who will require transportation to accomplish the desegregation under the proposal (Metro Hearings Tr. 452, 454, 694, 697, 744-45); (6) the maximum one-way transportation time for any student would be limited to approximately 40 minutes for full-time students (J.92a n.11; J.67a-70a) and (7) any increases in the total numbers of students transported and in total costs of transportation will be minimal. (J.72a-73a; e.g., Va 207 et seq. and Exhibits to deposition; Hearings re Detroit-Only Plans Tr. 346, 417) These factors are all well within the limits of common practice in the State and used by other District Courts, and approved by this Court, to accomplish desegregation. There was *no* showing that such court-ordered student transportation was in any way a disruptive element in education, especially at the elementary level. Based on this uncontroverted evidence, the District Court found that such transportation will not impose "any undue transportation burden on the children or on the state's system of public schooling. The time or distance children need be transported to desegregate schools in the area will impose no risk to the children's health and will not significantly impinge on the educational process." (J.69a-70a; See also J.66a-70a, 72a-75a).

Appeals to the Legislature for its consideration and called particular attention to its admonition that the Legislature be given an opportunity to act to remedy the constitutional violation and all its effects found. Proceedings are therefore under way below to address the many important issues left unresolved at this juncture in the case. See Memorandum in Opposition to Petitions for Writs of Certiorari.

Thus this Court's review comes in the middle of the trial proceedings and is limited to the narrow issue finally decided below. More than two years after the declaration of a massive, pervasive and generation-long violation of plaintiffs' constitutional rights to attend schools entirely free from state-imposed segregation and its effects they yet attend upon schools with that indelible taint. For plaintiffs the complete and effective disestablishment of the state-imposed core of black schools for all time remains only a constitutional promise.

Summary of Argument

In the Detroit, Michigan area almost all black children and some white children attend schools in Detroit; most white children and almost no black children attend schools in the adjacent suburban area.

The District Court, in findings affirmed without qualification by the Court of Appeals in a panel and thereafter *en banc*, concluded that Michigan and Detroit, acting through their respective school authorities and other public bodies, had for about two decades deliberately segregated white from black children in Detroit's schools and, moreover, had successfully undertaken to confine black children to a nucleus of black schools surrounded by a reciprocal ring of white schools in Detroit and the suburbs.

The courts below held, and we urge here, that the constitutionally required disestablishment of this substantially dual structure would not be afforded by relief limited to the Detroit system, and that its suburban neighbors, as related components of a state school system subject in practice and theory to Michigan's absolute control, may be required to participate in remedying the violation—absent a showing of impracticality or strong contrary interest, which was not forthcoming. The courts also held, and we also urge here, that the state and local authorities' area-wide violation—the deliberate confinement of black children to a core of schools within a line separating them from reciprocally white schools—is not constitutionally different from gerrymandering school attendance zone lines around black neighborhoods, and that State, both as a violator and as the ultimate guarantor of Fourteenth Amendment rights, may be required through the state school authorities practicably to involve its non-Detroit units in vindicating those rights.

Finally, review is sought here of the holdings below with respect to the adequacy of the hearings afforded potentially affected suburban districts. Their opportunities were ample, especially as state authorities were defendants from the outset. In any event, grounds for reversal are not involved because the matter is poised below for further hearings on remedy and any irregularity is readily curable before anyone is affected.

ARGUMENT

I.

Introduction

According to the petitioners, plaintiffs and the lower courts have leaped without precedent from trivial segregation violations, whose effects were minimal or limited, to an assertedly cherished nonconstitutional objective of schools variously described by petitioners as racially balanced, majority white, or racially unidentifiable in the context of southeastern Michigan. And this leap was made, their argument runs, irrespective of the innocence of suburban districts vis-a-vis the violations and without regard to other valid interests that would be infringed by the relief sought.

This Court has not held that the right of minority children to attend practicably desegregated schools— after a finding of illegal segregation—is secondary to the acknowledged general authority of the States to choose their educational arrangements. On the contrary, we believe that an examination of the relationship of the Fourteenth Amendment to public education, an inquiry into the nature of most school segregation, and a weighing of the interests typically served by present arrangements would lead this Court, and others, to the conclusion that the constitutional right of minority children must be given precedence.[35] *Cf. Brown* v. *Bd. of Education*, 349 U.S.

---

[35] The States involved in *Brown* argued that there need not be actual pupil desegregation—white and black children in the same schools and classrooms together—to cure state-imposed segregation, because any constitutional inequality imposed on the black children could be cured wholly within their schools if upgraded. In other respects, they argued, the States had the inherent right to subdivide their systems of public schooling as they saw fit. This Court squarely rejected those arguments in *Brown* and succeeding cases.

294, 299-301 (1955); *Green* v. *County School Board*, 391 U.S. 430, 437-442 (1968); *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15, 27-29 (1971); *Davis* v.

In this case petitioners make the same argument for similarly limiting the relief to which plaintiffs are entitled, i.e., basically to the schools they already attend. They argue that the Fourteenth Amendment rights of a "person" and obligations of a "State" are limited to the geographic jurisdiction of the particular state agency which is the violator of constitutional rights. Thus, arguing that any violation of plaintiff black children's constitutional rights, results solely from actions by the DSD, petitioners urge that any such violation should be cured only by the DSD and wholly within its geographical boundaries and that the State otherwise has the inherent right to subdivide its system of public schooling as it sees fit.

Assuming *arguendo* that petitioners are correct in placing the blame entirely upon Michigan's DSD agents, such contention, like the States' arguments in *Brown*, ignores the personal nature of the rights of black children to attend State public schools which are devoid of state-imposed racial segregation, regardless of its form. Moreover, petitioners' view vitiates the obligation of the State, as a State, to provide within its jurisdiction a racially unified, non-discriminatory system of public schooling. Under the United States Constitution, the State is free to choose any decentralized framework it wishes, so long as it fulfills its Fourteenth Amendment obligations to its children. Notwithstanding the Tenth and Eleventh Amendments, behind which petitioners would hide, the State may not, by delegation and compartmentalization of authority to sub-units, avoid its Fourteenth Amendment duties and limit the rights of persons. As held by this Court in *Ex Parte Virginia*, 100 U. S. 339, 345-347 (1880), with respect to the Reconstruction Amendments:

> They were intended to be, what they really are, limitations of the power of the States. . . .
>
> The prohibitions of the 14th Amendment are directed to the States, and they are to a degree restrictions of state power. . . . It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. . . . [E]very addition of power to the General Government involves a corresponding diminution of the governmental powers of the States. . .
>
> Whoever by virtue of public position under a state government . . ., denies or takes away the equal protection of the

Bd. of School Commissioners, 402 U.S. 33, 36-38 (1971); *Kelley* v. *Metropolitan County Bd. of Education,* 463 F.2d 732, 744 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972).

We also believe, however, that this question need not necessarily be reached here by the Court because it was not the gist of plaintiffs' claim nor, more importantly, the basis of the remedial holding of the courts below. That holding, we submit, was based upon the record made with respect to the nature and effects of the discriminatory conduct of the state and Detroit authorities.[36] Therefore, although Detroit's segregative practices and their local effects are no longer seriously at issue,[37] the state au-

---

laws, violates the constitutional inhibition; and . . . *his act is that of the State.*

(Emphasis added.) *See also Cooper* v. *Aaron,* 358 U. S. 1, 16-19 (1958).

Petitioners' argument is as pernicious to these fundamental constitutional principles as that of the States rejected in *Brown.* For decades plaintiff black children have been intentionally contained within a line to black schools. In 1974, it can be no more a remedy to continue to confine them (as petitioners would have it) within the same schools merely because the borders of the DSD extend no further, than it would have been in 1954 to continue to confine black children in the same schools merely because the black schools would be upgraded. This is so, not because of a doctrine of *respondeat superior,* at least not in the common-law sense, but because "State support of segregated schools through any arrangement . . . cannot be squared with the [Fourteenth] Amendment. . . ." *Cooper* v. *Aaron,* 358 U. S. at 19.

[36] The record, therefore, distinguishes this case from *Spencer* v. *Kugler,* an action involving the asserted federal right of minority children to require integration of schools regardless how they came to be segregated. 326 F. Supp. 1235, 1238 (D.N.J. 1971), *aff'd per curiam,* 404 U.S. 1027 (1972).

[37] Although the issues presented for review in petitioners' briefs and petitions for writs of certiorari do not include the violations on the part of Detroit defendants, two of petitioners argue in brief that such Detroit violation findings constitute error. Supreme Court Rules 23(1)(c) and 40(1)(d)(2), at a minimum, limit this Court's review of such Detroit violation findings to "plain error."

thorities' role in them and their effects upon schools in the metropolitan area are contested; and we shall argue from that perspective.

II.

The Nature and Scope of the School Segregation of Black Children by the Detroit and State Authorities Provided the Correct Framework for the Lower Courts' Consideration of Relief Extending Beyond the Geographic Limits of the Detroit School District.

In 1970-71, the first school year after this action was brought and during which it was tried, Detroit's schools enrolled almost 290,000 pupils, of whom about 64 percent were black and 35 percent were white. Of 282 regular schools, 202 were attended 90 percent or more by pupils of one race (133 black and 69 white), and three-quarters of all black students attended schools that were all-black or virtually so; about 44% of the teachers in Detroit were black. The remaining schools in the metropolitan area, which consists of the balance of Wayne County and Macomb and Oakland Counties, enrolled approximately 710,000 students, of whom more than 98 percent were white. Indeed, omitting such traditionally black suburban enclaves as Highland Park, Inkster, Ecorse, and River Rouge, the white percentage in the area's non-Detroit schools was above ninety-nine; and these virtually all-white suburban schools had essentially all-white staffs.

With respect to all factual findings, this Court's "two-court" rule limits review to plain error and the application of improper legal standards to the evidence. *Keyes* v. *School Dist. No. 1*, 37 L.Ed.2d at 557 n.9; *Graver Mfg. Co.* v. *Linde*, 336 U.S. 271, 275 (1949); *Comstock* v *Group of Inst'l Investors*, 335 U.S. 211, 214 (1948); *United States* v. *Johnston*, 268 U.S. 220, 222 (1925); *Amer. Const. Co.* v. *Jacksonville T. & R.R. Co.*, 148 U.S. 372, 384 (1893).

After some months of preliminary proceedings, described above, the parties and the District Court, at the direction of the Court of Appeals, undertook an inquiry into the circumstances of the extreme separation of black from white children in the schools of Detroit. The inquiry disclosed a litany of segregative practices, increasingly familiar to this Court, which (apparently many) Northern school authorities[21] employ to confine Negro children to a core of black schools separated—sometimes by a transitional buffer but often sharply by attendance area perimeters or asserted natural barriers—from outer-area white schools.

The devices included a longstanding pattern of segregative school construction throughout the metropolitan area which operated to segregate school facilities at their opening and thereafter to contain the black population (J. 26a-28a, 35a); the manifest segregative intent of this pervasive practice was augmented by the assignment of faculties at the opening of these new school facilities to mirror the uni-racial composition of the student bodies. (E.g., Va 24-30) At the edges of the expanding core of black schools, further *de jure* devices were invoked. Optional or dual overlapping zones were placed in areas undergoing racial change "to allow white youngsters to escape identifiably 'black schools'." (J. 35a). An entire administrative district, with concomitant school attendance boundary changes, was created to divide almost completely the black population from the white. (J. 120a-127a). In other instances boundaries were drawn to separate completely black children from white along the perimeter of the black core or purposefully to confine an isolated pocket of blacks to an all-black school surrounded by all-white schools. (J. 25a-26a, 35a). The core of black schools was

---

[21] *Cf. Brown I*, 347 U.S. at 491 n.6: "It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern."

further delineated by the practice, generally followed, of drawing north-south attendance zone boundary lines to incorporate and maximize the east from west separation of black and white residential areas. (J. 26a, 35a). And this was supplemented by discriminatory transportation practices and periodic manipulations of feeder patterns, grade structures and attendance zones "in a manner which has had the natural, probable and actual effect of continuing black and white pupils in racially segregated schools." (J. 26a). These and allied techniques have been repeatedly held by this Court, and the Circuits that have addressed the issue, to be on the same constitutional footing with Southern segregation statutes. *Keyes* v. *School District No. 1, Denver, Colo.*, 37 L.Ed.2d 548 (1973).

In addition to their scrutiny of the purposes and effects of particular policies and practices of the school authorities, the courts below made a searching inquiry into the relationship between segregated schools and housing patterns. This inquiry was prompted by the signs of a growing judicial awareness that the relationship between schools and housing segregation is less fortuitous or one-way than the prior "*de facto* segregation" rhetoric had posited (see note 3, *supra*), and by the repetitious insistence of defendants' counsel that in the Sixth Circuit housing segregation justifies or excuses school segregation—citing *Deal* v. *Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).[39] After that inquiry the district court concluded:

> The City of Detroit is a community generally divided by racial lines. Residential segregation within the city

[39] The fact that the district judge who tried *Deal* (Judge Peck) and a member of the Sixth Circuit panel which affirmed *Deal* (Chief Judge Phillips) were members of the *en banc* majority below has failed to deter at least one of the petitioners (Grosse Pointe Brief at 41 n.77) from urging in this Court that *Deal* is dispositive.

and throughout the larger metropolitan area is substantial, pervasive and of long-standing. Black citizens are located in separate and distinct areas within the city and are not generally to be found in the suburbs. . . . [T]his pattern of residential segregation . . . is, in the main, the result of past and present practices and customs of racial discrimination, both public and private. . . .

Governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations . . ., to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area. . . . While it would be unfair to charge the present defendants with what other governmental officers or agencies have done, it can be said that the actions or the failure to act by the responsible school authorities, both city and state, were linked to that of other governmental units. . . . [A]ll of them, including the school authorities, are, in part, responsible for the segregated condition which exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of the schools. (J. 23a-24a).

• • •

Pupil racial segregation in the Detroit Public School System and the residential racial segregation resulting primarily from public and private racial discrimination are interdependent phenomena. (J. 35a).

Cf. Keyes, 37 L.Ed.2d at 559-60; *Swann,* 402 U.S. at 20-21.

These findings, that massive and longstanding governmental and quasi-governmental residential racial discrim-

ination, coupled with intentionally segregative school action, confined black families to an expanding and identifiable neighborhood and school core, while reciprocally creating and shielding a white outer area, have not been challenged much less controverted. In sum, it was and is clear in the Detroit area, and perhaps elsewhere in the North, that governmentally induced and supported housing segregation is integral to school segregation in and among ostensibly unitary systems. In the South, on the other hand, at least until the advent of some actual desegregation following this Court's rulings in *Green* v. *County School Bd.*, 391 U.S. 430 (1968), and companion cases, residential segregation and devices for incorporating its effects into school systems were generally unnecessary in the presence of unqualified segregation statutes and such post-*Brown* practices as pupil placement tests and freedom of choice.

It is in this context, we urge, that a central contention of the petitioners—that the Detroit school authorities' segregative practices were not more than minor tinkering affecting only a few thousands of children and a limited number of schools—must be evaluated. This contention, we submit, asks that this Court disregard the findings of the courts below that the school authorities did all that needed to be done to confine black children to schools designated for them by augmenting and reinforcing residential segregation. Moreover, the courts below tested whether this containment effect was merely the by-product of neutral educational policies. Upon inquiry the courts found, at the racially defined perimeter, gerrymandering of school attendance boundaries and feeder patterns to separate white children from black, and optional zones to serve as emergency exits for white stragglers. Of course, the principal reciprocal effects of this policy were the creation and shielding of white schools outside the area of quarantine and

the movement of immigrating whites and blacks to their designated areas of schooling and housing—all of which were accommodated by a massive, two-decade long program of new construction of, and additions to, one-race schools (e.g., J. 77a-78a, 87a), thereby further cementing the basic dual structure and fueling the segregation environment already fostered. *Keyes*, 37 L.Ed.2d at 559-61, 565. These then were the factors constituting the "loaded gameboard" which the lower courts properly considered, pursuant to this Court's direction in *Swann*, in probing for the contours of appropriate relief. 402 U.S. at 23; *see also* 402 U.S. at 20-21.

It is also in this context, we believe, that petitioners' characterization of the district judge[40] (and to a lesser extent of six of nine[41] court of appeals judges) as advocates of racial balance, majority white schools and white stability, reflects a fundamental misunderstanding of the actual holding of the lower courts and the record. A careful reading of the record and of the lower court opinions discloses that the citation of demographic data (J. 19a-22a; 49a, 52a; 54a-55a; 164a, 172a-173a), rather than revealing sinister sociological predilections, relates to the constitutional implications of the black core's growing proximity to the borders of the DSD—the school district boundary was (and is) fast replacing attendance zone manipulation as the vehicle of apartheid. *Cf. Wright* v.

---

[40] A district judge, we note, who twice held against plaintiffs in 1970 and 1971—precipitating two appeals—and who, despite a strong record, initially denied relief as to faculty and staff.

[41] Judge Miller, who dissented below on procedural grounds only (J. 239a-40a), has recently embraced the substantive holding of the opinion below, writing for a panel of the court in *Newburg Area Council, Inc.* v. *Bd. of Education of Jefferson County* and *Haycraft* v. *Bd. of Educ. of Louisville*, —— F.2d —— (Nos. 73-1408-1408) (6th Cir. Dec. 28, 1973).

Council of City of Emporia, supra, 407 U.S. at 464-65; *United States* v. *Scotland Neck City Bd. of Educ.,* 407 U.S. 484, 491-92 (concurring opinion). The lower courts' confrontation with the boundaries of the Detroit School District thus became inescapable: do those school district boundaries now serve as the fail-safe mechanism for black containment? may those boundaries be interposed as the latest (and, as petitioners would have it, jurisdictional) barrier to disestablishment of the state-imposed core of black schools?

A second contention, advanced here and below primarily by the State petitioners, is that the practices of the Detroit school authorities, while constituting state action for jurisdictional purposes, were not state conduct in the sense, perhaps, of histrionic interposition (compare, for example, *Cooper* v. *Aaron,* 358 U.S. 1 (1958)) or *per se* unconstitutional state legislation; and that nothing else done or omitted by state-level authorities could be a basis for holding them accountable in any direct sense for the existing segregation.

The notion that state-level officials are insulated from accountability for local constitutional misconduct by their honest ignorance of it, especially where the issue is participation in relief as distinguished from, say, personal liability in damages, is simply at this late date insupportable.[43] To accommodate self-imposed irresponsibility

[43] Indeed, today's question among desegregation plaintiffs' counsel is less, why have so many cases had to be brought after *Brown* then, why have so few been brought against state officials. *Turner* v. *Warren County Board of Education,* 313 F.Supp. 380, 386 (E.D.N.C. 1970). The answer does not relate to the suability of States by the United States but not by citizens, at least since *Ex Parte Young,* 209 U.S. 123 (1908), or to whether state officials are empowered to effect compliance. *Edgar* v. *United States,* 404 U.S. 1206 (1971) (Black, J., in Chambers).

on the part of public officials would defeat the affirmative purposes of the Fourteenth Amendment; and it is familiar law that officials who can effect relief may be added as parties regardless of their personal innocence vis-a-vis the original wrong. *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 234 (1964).

But petitioners' question—whether a vicarious liability theory will sustain involving the State and its other education components so directly in relief—need not be reached, or even correctly reframed.[43] To argue in terms of whether the State must participate so affirmatively to provide effective relief—where its involvement is remote and only conceptual—misstates, we submit, the record and findings of the courts below. That record and those findings, which we shall review briefly here, are that the state-level authorities were involved in fact as well as vicariously in the relevant segregative policies and practices. To be sure, all of the interlocking, mutually supportive segregation devices did not originate with the state authorities, but the State did its part and for as long as local practices effected segregation, no more was required at the state level.

During all of the period of segregative school site selection and construction the State had constitutional responsibility to forbid such practices and invalidate their effects, and during much of that period state-level authorities had explicit state statutory school site responsibilities. Yet segregative building continued apace (J. 26a-27a; J. 77a-78a). A range of other state education policies disfavored Detroit in comparison to adjacent districts. These in-

[43] "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958). *See* Note 35 *supra*.

cluded pupil transportation reimbursement to the suburbs but not to Detroit, which was a factor in the building in Detroit of small, walk-in schools to serve segregated neighborhoods, while the ready availability of bus transportation made new schools convenient and attractive to the growing white population in the suburbs. (J. 27a; 78a). Detroit's lesser school bonding authority and the working of the state school finance system, which left Detroit Public Schools virtually bankrupt, were found to be other contributing factors. (J. 27a).

The petitioners stoutly dispute here whether such policies were remotely racially motivated and whether they were in fact discriminatory in any sense. The implication is that the discrimination, if any, involved urban —non-urban controversies related more to *Baker* v. *Carr* than to *Brown* v. *Board of Education*. That explanation, we urge respectfully, is interesting but irrelevant.[44] The gravamen of the lower courts' holding is that when state policies were causing Detroit to be perceived as the state education system's stepchild, modern schools were going up in the suburbs with state aid and approval, while owing to area-wide housing segregation and discrimination—largely governmental itself — only white families could respond to the message that there was a nearby haven of strong all-white schools.

The capstone of state involvement, which the courts below examined for itself and as probative of what underlay other state policies whose purposes and effects were disputed, was the adoption of Public Act 48 of 1970, M.C.L.A. §§388.171a et seq. (State's Brief App. 54aa-58aa). Compare *Keyes*, 37 L.Ed.2d at 562-63. In April

[44] Moreover, in the metropolitan Detroit area, there is no such urban-rural distinction; except with respect to race and schools, the interests are more common than competing. (J. 79a-80a).

of 1970, after more than a decade of segregative practices presided over approvingly by the State, the Detroit Board, after proposing reorganization across school district lines to accomplish desegregation, adopted certain modest desegregative steps at the high school level and proposed to subdivide the district into a number of biracial decentralized units. The state legislative response was swift and decisive: Act 48 nullified the desegregation steps; reorganized the district into different, more racially identifiable decentralized districts wholly within DSD; revalidated the outer boundaries of the DSD; and mandated intentionally segregative pupil assignment criteria for the DSD, and no other district, of "neighborhood" schools (but supplemented by "open enrollment").

To the argument so labored by petitioners, that the segregative role of Act 48 was limited, the courts below reached a contrary conclusion. To the courts below, Act 48 confirmed not only the plenary nature of state authority, in practice as well as theory, but also state complicity in the long-standing constitutional violation, the purposeful containment of black children.[45] (433 F.2d 897; J. 27a-28a; J. 49a-50a; J. 151a-153a; J. 171a).

---

[45] Act 48, more than any other single action, enlightens judicial inquiry into the nature and intent of the state-level contribution to the basically dual structure of public schooling in the Detroit area. As long as Detroit school authorities exercised their state-delegated pupil assignment discretion (M.C.L.A. §§ 340.583, 340.589, State Brief App. 49aa) actively to maintain segregation, state officials were content. To sustain this racially dual system of schooling, state authorities needed to exercise their general and specific supervisory authority over the local officials only to the extent of tacit approval and the provision of financial support and other wherewithal. But when DSD authorities exercised their discretion to breach the dual structure by assigning white pupils to the state-imposed black core, the State acted dramatically to bring them back into line (and to prevent future straying) by making mandatory and explicit the State's segregation policy. Michigan's delegation of local pupil assignment discretion, which

It was against that background with respect to the nature and scope of the violation that the District Court approached the question of commensurate relief.

III.

Based Upon Their Power and Duty to Achieve a Complete and Effective Remedy for the Violation Found, Taking Into Account the Practicalities of the Situation, the Courts Below Were Correct in Requiring Interdistrict Desegregation.

Having found that the state and local defendants' practices had confined black children to a nucleus of black schools, while reciprocally maintaining schools for white children on the fringe of Detroit and beyond, the District Court turned to the question of relief. From the outset it has been undisputed that courts need not exercise their

---

petitioners parrot in their Briefs, is thus no discretion at all: it is less than the local option for segregation which Kansas accorded to Topeka, and more akin to the Southern compulsory segregation laws with which *Brown* also dealt. It is in this context that the other state-level contributions to racial dualism in Detroit area schools (see pp. 50-51, *supra*) must be judged. Having mandated segregation by statute, State petitioners may not rest on indulgent presumptions of racial neutrality in defense of other of the State's actions which were found to have contributed to Detroit area school segregation. The Act 48 violation at the very least shifts to the State the heavy burden of establishing that racial separation of children in the Detroit area is in *no* part attributable to other state-level discriminations against the DSD, *and* that state financial support and tacit approval of local *de jure* practices were not intended. Viewing the entire record, the lower courts held in effect that no such showing was made. *Cf. Keyes* v. *School Dist. No. 1, supra.* (The propriety of requiring state defendants to justify their actions is all the more clear where the overwhelming majority of Michigan's black children are attending school systems found by federal courts to be suffering from systematic racial discrimination in pupil and/or faculty assignments. See note 17, *supra.*)

broad equity powers to the fullest if complete desegregation can be accomplished simply; that is, within a lesser area than encompassed by the violation and by means convenient and economical rather than awkward and expensive. *Cf. Swann*, 402 U.S. at 15, 23. Moreover, all have understood that desegregation planning is subject to practicability limitations, *Swann*, 402 U.S. at 15, 30-31; if there are not majority (or minority) children within an area of feasible desegregation, then some schools will remain as vestiges of violations because school authorities lack the practical wherewithal to provide relief.[46]

Attention was given first to various Detroit-only desegregation plans. It was evident that the objective of "just schools" in the relevant segregation area, itself about 80 percent white, could not be met by establishing almost 300 two-thirds black schools surrounded by a greater number of virtually all-white schools. The District Court viewed such proposals as tantamount to judicial validation and compounding of the essence of the violation (J. 55a-56a). The District Judge, guided by the principles established by this Court, called upon the defendants to justify their preference for an ineffective plan, in light of their obligation to come forward with a plan that promises to accomplish all-out desegregation now and hereafter. *Green*

---

[46] Moreover, in many such largely one-race areas, either white or black, "just schools" may mean a pattern of virtually one-race schools. For example, in a State like Montana—with almost a 100% white population, we would expect normal administrative practice to result in a consistent pattern of nearly all-white schools. Similarly, in the "black belts" of the South normal administrative practice may result in a consistent pattern of schools all predominantly black. *See, e.g., Wright* v. *Council of Emporia, supra; United States* v. *Scotland Neck, supra.* Bureau of the Census, General Social and Economic Characteristics (1970), Tables 119-120, 125. (Thus, petitioners' citation of this Court's approval—indeed requirement—of "majority black" schools in such "black belts" as authority for reversal of the lower courts in this case is a *non sequitur*.)

v. *County School Bd.*, 391 U.S. at 439; *Keyes*, 37 L.Ed. 2d at 566.

The response of the state and suburban district petitioners has been that a Detroit-only plan must be held constitutionally sufficient because school district boundary lines are themselves an absolute legal impracticality of the local situation (J. 49a-50a). Such lines, it is maintained, delineate self-governing units and are also school attendance boundaries or zones which federal courts are powerless to traverse or otherwise affect—absent a showing that the lines have been created or gerrymandered for segregative purposes, as, for example, in *United States* v. *State of Missouri*, 363 F. Supp. 739 (E.D. Mo. 1973).

In the course of the proceedings that ensued, the District Court examined in detail local practicalities from standpoints of educational administration, traditional practices, and other factors long relied upon by the courts in evaluating the feasibility of desegregation proposals. (J. 61a-84a). Apart from some very recent intimations of inconvenience and interests involved, the petitioners have steadfastly declined to participate in that inquiry, or to set out competing interests at stake, because of their view that the violations and their effects had not extended beyond Detroit and that, in any event, boundary lines are impermeable and not subject to judicial tampering. (J. 62a-65a).

Plaintiffs' view below was that, regardless of their status under Michigan law, local districts are constitutionally not more than administrative units of a state school system which may be required—if practicable and necessary to accomplish desegregation—to participate in remedying even a violation limited to Detroit and its authorities. *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964); *Ex Parte Virginia*, 100 U.S. 339, 347 (1880). Surely that is the case, in our view, where the state was a principal in a violation whose

effects permeated its other units in the Detroit area. *Cf. Hoots* v. *Comm. of Pennsylvania*, 359 F. Supp. 807 (W.D. Pa. 1973).

Of course, where the State in fact treats its districts as malleable units whose powers are delegated and subject to contraction, then it becomes clear that a happenstance present form of organization actually does not serve an interest which outweighs constitutional requirements whose achievement is otherwise feasible. Moreover, where a State regulates its districts as would a local board its decentralized regions or multi-school attendance zones, then the asserted confrontation between federal judicial power and inalienable local prerogatives is not presented. (J. 27a-28a; J. 36a-38a; 165a-173a). Powers exercised by a State in practice, as well as committed to it in constitutional theory, are not less available merely because the State chooses selectively to renounce or not to use them. Consequently, the inquiry below turned to *actual* Michigan law and practice. *Cf. Evans* v. *Buchanan*, 256 F.2d 688, 690-693 (3d Cir. 1958).

The courts below concluded at length that Michigan operates and maintains a state school system, not only in the sense that the United States Constitution speaks to the States and precludes sovereign, constitutionally unaccountable subdivisions, but also in the sense of actual state control. The categories of state regulation are virtually endless, but especially pertinent here are the findings that pupils attend schools across district lines, that district lines have not impeded the creation or operation of intermediate districts and other special purpose units, and that the State possesses the power, which it has periodically exercised, to create, dissolve, and modify school districts. (J. 23a-24a, 27a-28a, 36a-38a, 49a-50a, 57a, 79a-80a, 96a, 151a-57a, 165a-75a) (*See also* pp. 64-65, *infra*).

The District Court concluded, in substance, that boundary lines may indeed serve administrative convenience, but that they do not embody other compelling interests, and that they may not be transformed belatedly into impermeable school attendance zone lines.[47] (J. 27a-28a; J. 79a-80a; J. 165a-175a).

Looking toward relief, the District Court again sought the aid of the petitioners in identifying local practical-

---

[47] The particular welter of eight-five school districts in the Detroit area is not necessary to promote any legitimate purpose. First, the school district boundaries are largely unrelated to other local governmental entities. District lines coincide with municipal boundaries in only ten instances. Seventeen districts lie in two counties, two in three counties. Two districts are totally surrounded by the DSD; another is bordered on three sides by the DSD. One district serves five municipalities; while other suburban municipalities are fragmented into as many as six school districts. (*See, e.g.*, Ex. M2). There is a total lack of regularity in the shapes of these districts and their size ranges from 2,000 to 285,000 pupils; and over the past decades, the State has regularly altered school district boundaries to suit its own purposes. In the face of such maze, petitioners failed to show how the present school district boundaries serve any identifiable interest that cannot be served equally well by another line drawn elsewhere. (J. 79a-80a; J. 167a-171a).

Second, the school districts and their boundaries were shown to be administrative conveniences. The State has not hesitated regularly to cross or alter these lines in countless instances for a variety of educational purposes. The State has been careful to preserve its ultimate authority *vis-a-vis* the local districts; and the State has provided detailed statutory guidance to the local districts and has used its ultimate power to reverse any decision of a local school district with which it took exception. In Michigan local school districts are creations of the State designed to assist in administering the State's system of public schooling. (J. 36a-38a; J. 50a; J. 79a-80a; J. 151a-154a; J. 165a-174a).

Finally, petitioners failed to show that the State's legitimate interest in delegating administrative responsibility for public schooling to local districts, responsive to more local interests, would be frustrated by crossing or modifying existing boundaries in order to disestablish the state-imposed core of black schools. Indeed, state law already provides the mechanisms, in detail, for accomplishing such disestablishment by pupil transfers between existing districts, e.g., M.C.L.A. §§ 340.582, 340.69, 340.121(d),

ities (other than the reiterated preference for the status quo) so as to accommodate in every way possible existing arrangements in the formulation of an adequate plan. Perhaps in order to avoid an implied waiver of their legal position, or perhaps because there are no impracticalities to inter-district desegregation, none were advanced. In any event, in the present posture of this action below, following remand by the Court of Appeals for joinder of all possibly affected districts, adversary consideration of those issues is not yet foreclosed in order to tailor any effective plan to promote legitimate state and local interests.

This Court has held that state administrative or jurisdictional arrangements, however innocent in their inception or unobjectionable in some contexts, must yield to the achievement of constitutional remedies unless it can be shown that there is no less discriminatory way of fulfilling important state interests. *E.g., Carrington* v. *Rash*,

---

340.1359, 340.1582, or annexation and consolidation, e.g., M.C.L.A. §§ 340.302a *et seq.*, 388.681 *et seq.*, and 340.183 *et seq.* Additionally, the lower courts here deferred any reorganization to the legislature, thereby leaving it wholly free to experiment and adapt local school districts in the Detroit area to suit local needs and state obligations. (J. 80a-82a; J. 177a; J. 188a-189a).

Thus, in *Wright* v. *Emporia*, and *United States* v. *Scotland Neck*, *supra*, and *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973), this Court has recognized that local districts may serve a legitimate state interest in decentralizing administration to carry out state responsibilities and to respond to local interests; but the Court made clear that the State's choice of a particular local arrangement may not serve to frustrate the federal power to disestablish state-imposed segregation now and hereafter. Here, as in *Emporia* and *Scotland Neck*, the lower courts carefully considered local school districts as but one of the practicalities of the local situation. They concluded that the State's legitimate interests can be met by a wide variety of available alternatives which do not require the maintenance of existing school district boundaries as an absolute bar to disestablishing state-imposed segregation. (Exercising judicial restraint, they then deferred decision on which alternative to choose to the legislature).

380 U.S. 89 (1965); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *compare White* v. *Regester*, 37 L.Ed. 2d 314, 324-26 (1973) *with Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). Similarly, the suburban districts urge that they may not be required to participate in affording a remedy because it has not been shown that as entities they participated in the violation. But this Court has not required such a showing as a precondition to involving state agencies or components where that involvement is needed for adequate relief and is feasible. For example, over-represented electoral districts are required to participate in reapportionment, although their only participation in the violation was to do nothing about it. In addition, electoral districts which themselves meet representation standards are frequently redrawn as a part of the process of redrawing over- and under-represented districts. No finding of fault on the part of each electoral district is a prerequisite to involvement in the constitutionally required remedy.

Petitioners, understandably, seek to distinguish this case from *Brown II's* express recognition that in remedying state-imposed segregation the myriad of incidental and largely unforeseeable administrative practicalities might include "the revision of school districts," as well as "school attendance areas" and other "local laws and regulations." 349 U.S. 294, 301 (1955). Petitioners, understandably, also seek to distinguish this case from *Emporia's* express recognition that local school districts may not be created or used even to raise the potential for frustrating the continued operation of a unitary system some time hereafter. In their view, this case involves innocent lines which have statistical effects but no stigmatization (*cf. Spencer* v. *Kugler, supra*) or valid interests with secondary unintentional effects (*cf. James* v. *Valtierra*, 402 U.S. 137 (1971); *San Antonio Ind. School District* v. *Rodriguez*,

supra) that are constitutionally unobjectionable. We are willing to debate those issues, especially where the subject matter involves both race and schools. But this Court should bear in mind that to treat those contentions as issues here unnecessarily disregards the lower court findings that the State intentionally confined blacks to schools within a line in a way not constitutionally different from intentionally drawing a line around them.[48] (J. 87a).

In the final analysis then, this case does not entail the involuntary involvement in remedy of strangers to the violation. Unless the lower courts' findings are to be overturned, the State, functioning as the common mentor of all systems in the Detroit area, was deeply and prolongedly involved in segregative practices which affected its suburban units in an opposite and equal way to their effect upon Detroit.[49]

---

[48] The point is that such confinement to a state-imposed core of black schools separate from surrounding white schools can be readily accomplished by several means other than, but equally effective as, gerrymandering a new school district line around the black core population.

[49] Thus, whatever the merits of the Fourth Circuit decision in *Bradley* v. *School Board of the City of Richmond*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by equally divided Court*, 412 U.S. 92 (1973), the decision of the lower courts here is not in conflict. For in the Richmond area, unlike the Detroit area, there had existed three distinct dual systems with substantial numbers of black and white children assigned to separate schools within *each* of the three school divisions, pursuant to state law and practice. In the Fourth Circuit's view these three dual systems, each of which had already been subject to federal scrutiny, had each been disestablished by the time the district court ordered a consolidation of the districts. 462 F.2d at 1061. Here there is but one basic dual structure throughout the metropolitan area; a state-imposed core of black schools surrounded by overwhelmingly white schools. Thus, in the Detroit area, initial disestablishment of the basic dual structure has yet to be accomplished.

There are other distinguishing features between Richmond and Detroit as well. First, Richmond did involve a court-ordered con-

IV.

The Actions by the Lower Courts to Date Have Not Violated any Federally Guaranteed Procedural Right of Suburban School Districts.

The presentations by suburban school district petitioners and amici of argument on procedural issues is unhelpful in analyzing the applicable legal principles or providing guidelines on how parties and courts should proceed to hear cases in the circumstances of this case. Without distinction or analysis, petitioners yoke issues of equity jurisdiction, who and what is protected by the Fifth and/or Fourteenth Amendments, and what Rule 19 requires or counsels. Before attempting to assay these issues in a

---

solidation of districts; here no consolidation has been ordered and the framework of reorganization has been left to the political processes. Second, the Fourth Circuit held that the "power to operate, maintain and supervise public schools in Virginia is, and always has been, within the exclusive jurisdiction of the local school boards." 462 F.2d at 1067. Here analysis of Michigan state law and practice, and this case, "amply supports the finding that the State of Michigan has not been subject to such limitations in its dealings with local school boards." (J. 175a). Rather, local school districts in Michigan are subordinate governmental entities fashioned by the State to assist in the state function of public education and are absolutely subject to the State's power. (J. 165a-171a; J. 79a-81a; J. 30a; J. 36a-38a). Third, we hope by now that it is manifest that the courts below were not motivated in this case by the non-judicial goal of imposing a "fixed racial quota." Contrast 462 F.2d at 1064. Finally, the Fourth Circuit determined that the causes of racial concentration in the Richmond area were unknown and did not include action by school authorities. 462 F.2d at 1066. Based upon the record *evidence* the courts below *found* that intentional and discriminatory action by state and Detroit school authorities, operating in conjunction with various state policies, had a pervasive impact on the confinement of black children to, and official identification of, the black core, which actions had an interdependent effect on the pervasive residential segregation (itself largely the result of public and private discrimination), which in turn further contributed to the dual structure. (J. 23a-24a; 77a-78a; 151a-157a; 177a).

coherent fashion, the Court should recognize at the outset two facts which override review of procedural issues in this case.

First, at this stage of the proceedings, suburban school districts have been finally ordered to do absolutely nothing substantial. Hence, their claims of procedural deprivation are merely claims of *potential* error; and any such *potential* error may be corrected on remand prior to the entry of any final order, by the proceedings already under way in the District Court.[50] In our Memorandum in Opposition to Petitions for Writs of Certiorari, p. 3, n. 2, we have already noted that at these proceedings on remand suburban school districts will have the opportunity to present relevant evidence on all issues, even as to the constitutional violations found by the District Court, upon a proper showing.[51]

---

[50] In remanding this case the Court of Appeals directed the District Court to afford to "any party against whom relief is sought, including school districts which heretofore have intervened and school districts which hereafter may become parties . . . an opportunity to offer additional evidence, and to cross-examine available witnesses who previously have testified, on any issue raised by the pleadings, including amendments thereto, as may be relevant and admissible to such issues." (J. 177a-178a) This direction is in accord with the traditional legal principles under which federal courts in equity actions have always afforded parties litigant an opportunity to be heard upon a proper showing of the relevance and admissibility of evidence. *Cf. Kelley* v. *Metropolitan County Bd. of Educ.*, 463 F.2d 732, 745-46 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972). We respectfully suggest that the District Court will allow the added defendants to develop all relevant evidence on the issues both of violation and of remedy upon a proper showing. (Although the Court of Appeals added that the District Court need not consider evidence with respect to the constitutional violation and inadequacy of "Detroit-only" plans (J. 178a), it did not direct the District Court to *refuse* to consider such evidence if offered.)

[51] The suburban school districts recognize, however, that their own discriminatory and segregative conduct has not been questioned by the plaintiffs nor considered by the District Court. (E.g. Grosse Pointe Brief 6). Plaintiffs' amended complaint to

On this review there is no just cause for believing, in advance of the District Court's ruling on specific evidence presented by suburban school districts, that it will restrict petitioners from the opportunity to be heard on all issues relevant to a final order to disestablish state-imposed segregation.[51]

---

conform to the evidence does not allege such *de jure* conduct by suburban school districts but only violations by Detroit and State defendants, operating in conjunction with the discriminatory effects of state law already of record. (Ia.291 *et seq.*; Allen Park Brief 20 n.14) Thus, exactly what suburban school districts may add to consideration of the violation findings or evidence remains unclear; after eighteen months of trial and appellate litigation they have never said what evidence they would or could present on this issue. But whatever it is they have to add on remand, they will have an opportunity to present it in order to challenge the previous findings of the District Court and create a record for appellate review. Indeed, they have an opportunity any litigator would treasure: they may sift through the evidence of record and the findings for the purpose of attempting either to destroy them or to present evidence supportive of an alternative view. In view of the evidence already introduced documenting the use by Detroit and Michigan school officials of virtually all of the classic segregating techniques which have been identified by this and other courts, the District Court's violation findings seem likely to be reaffirmed; perhaps, that reality is what suburban school districts seek most to avoid by their present claims of procedural error.

[51] The petitioner suburban school districts did attempt below to relitigate the *Brown* decision by suggesting a return to the discredited "separate but equal" policy on the basis of "new" social science studies purporting to show that desegregated schooling does not raise the achievement test scores of black children as much as some other social scientists may have originally suggested. The District Court excluded such evidence, in our view properly, because its finding of state-imposed segregation and consideration of a remedy therefor were not based in any way on such "achievement test" evidence; thus such evidence was and is irrelevant. The District Court's reasoning fully supports that ruling:

> In the main such proof entirely misses the point: the violation here found has to do with school segregation caused in substantial part by force of public authority and action; yet the intervening defendants' questions and offer of proof speak

Second, plaintiffs framed and tried this case against State-level agencies and officials who were sued for the purpose, *inter alia*, of assisting in the provision of all relief that a trial on the merits might show to be necessary; and they would clearly be bound by any injunction issued by the District Court.[52] The powers of these state officials to assist in providing relief to plaintiffs, even across the boundaries of school districts not parties, is clear as a matter of both state and federal law. Under state law action of the State defendants is required in order to permit the operation of almost all the affairs of the local school districts: for example, (1) absent statement, authorization and warrant, state aid would not be distributed to local

---

mainly to educational theory and recent and sometimes contradictory research about narrowly measured educational effects, mostly on achievement test scores, of quite limited beginnings of racial or socioeconomic integration of various types and as compared with the effects of dollar or other resource inputs and continued segregation. This court does not understand, however, that such research, from the Coleman report to its many reanalyses, formed the primary bases for the Brown decision or any of its progeny. See, e.g., Brunson v. Bd. of Trustees, 429; 2d 820, 826 (4th Cir. 1970) (J. Sobeloff, concurring). In the context similar to newly intervening defendants' objections to desegregation, the Supreme Court in Swann specifically held that such factors constitute an impermissible limit upon the duty to desegregate. 402 U.S. at 24, fn.8. Citation to such research, either in support or rejection of school desegregation, misses the primary point: insofar as pupil assignments are concerned, the system of public schooling in every state must be operated in a racially non-discriminatory, unified fashion; until that objective is met, the very system of public schooling constitutes an invidious racial classification. (J. 89a)

[52] This is not to suggest that non-parties would not have a constitutional duty to refrain from taking action which would obstruct the vindication of plaintiffs' constitutional rights, only that such non-parties might not be held in contempt for taking such action until joined as parties and subjected to the jurisdiction and commands of the court. *Cf.* Rule 65(d), F.R. Civ. P.; *Schrader* v. *Selective Service System Local Bd. No. 76*, 329 F. Supp. 966, 967 n.1 (W.D. Wis. 1971). *See also Cooper* v. *Aaron*, 358 U.S. at 17-20.

districts, M.C.L.A. §388.1117; (2) absent inspection and approval of new school plans (and, formerly, sites), schools could not be built, M.C.L.A. §388.851; (3) absent qualification, school building bonds could not be sold; (4) absent certification, teachers could not teach, M.C.L.A. §388.1010; (5) and absent approval, no borrowing for school operations can be made, M.C.L.A. §388.1234. The State defendants also have general supervision over, and power to promulgate regulations governing, all public education in the State. Mich. Const. Art. VIII, Sec. 3; *Welling* v. *Livonia Bd. of Ed.*, 382 Mich. 620 (1969). They have the power to require each local board of education and officer to comply with the law, including by institution of appropriate legal proceedings in courts of competent jurisdiction, and by removal of non-complying local officials from office, M.C.L.A. §§340.252-53;[54] thus, they must, for example, insure that no school or department is kept for any person on account of race or color, M.C.L.A. §340.355, and prevent denial of the equal protection of the laws and racial discrimination, Mich. Const. Art. 1, Sec. 2. Manifestly, State defendants had the authority to prevent the violation here and now have the statutory authority practicably, subject to the District Court's injunction, to insure the implementation of complete relief absent some legislative intervention or local resistance to such lawful actions.[55] That federal district courts have the power to

---

[54] Thus the State defendants in the past and now could enforce any law, constitutional requirement, or injunction by resort to appropriate state courts.

[55] Moreover, and in addition to their affirmative Fourteenth Amendment obligations, State defendants, as the disbursers of federal funds, have assumed a legally enforceable duty under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, to prevent or eliminate racial discrimination in any program receiving federal financial assistance. *See Lemon* v. *Bossier Parish School Board*, 240 F.Supp. 709, 713 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir. 1967); *Lau* v. *Nichols*, —— U.S. ——, 42 U.S.L.W. 4165 (Jan. 12, 1974).

order state officials subject to their jurisdiction to exercise such powers to disestablish state-imposed school segregation, with or without local school districts as parties, is by now obvious. *See, e.g., United States* v. *Texas Educ. Agency*, 321 F. Supp. 1043 (E.D. Tex. 1970) and 330 F. Supp. 235 (1971) *aff'd with mod.*, 447 F.2d 441 (5th Cir. 1971), *stay denied*, 404 U.S. 1206 (Black, *J.* in Chambers),[55] *cert. denied*, 404 U.S. 1016 (1971); *Lee* v. *Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala.), *aff'd per curiam*, 389 U.S. 215 (1967); *United States* v. *Georgia*, 428 F.2d 377 (5th Cir. 1970), 445 F.2d 303 (5th Cir. 1971), 466 F.2d 197 (5th Cir. 1972); *Evans* v. *Buchanan*, 256 F.2d 688 (3d Cir. 1958), 281 F.2d 385 (3d Cir. 1960); *Hoots* v. *Commonwealth of Pennsylvania*, 359 F. Supp. 807, 821-2 (W.D. Pa. 1973).

Given this context, the following discussion will attempt to analyze the procedural issues, and the ramifications of alternative approaches, should this Court wish to provide guidelines to the parties and the District Court on remand. We reiterate, however, our view that such consideration is both premature and unnecessary.

---

[55] On the stay application, Mr. Justice Black considered an order directing state education officials to take "certain affirmative action" to eliminate all vestiges of discrimination from the public schools in the State of Texas "by withholding funds and accreditation" from local school districts which failed to meet their constitutional obligations. The District Court order "dealt with areas of student transfers, changes in school district boundaries, school transportation . . ." Justice Black denied the stay application because the District Court's order "does no more in my view than endeavor to realize the directive of the Fourteenth Amendment that racial discrimination in the public schools must be eliminated root and branch." 404 U.S. at 1206-1207.

A. In the Circumstances of This Case, Rule 19 and Traditional Principles of Equity Jurisdiction Do Not Require the Joinder of Local School Districts Where the Parties Already Before the District Court Can Grant Effective Relief and There Remains a Substantial Uncertainty Whether and How Their Interests Will Be Affected, If At All.

In 1966 Rule 19, F.R. Civ. P., was amended to overcome the severe problems which had accompanied interpretation of the technical definitions under the former rule and the diverse practicalities which face federal district judges in the course of proceedings. The notes of the Advisory Committee state the principles for decision under the amended rule in the circumstances of this case:

1. Whenever feasible, persons materially interested in the subject of an action should be joined if in their absence complete relief could not be accorded among those already parties or the disposition of the action would be as a practical matter impair or impede the absent party's ability to protect his interest; however, when this comprehensive joinder cannot be accomplished, for example because of lack of jurisdiction over the party sought to be joined, the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action among the present parties or dismissing the action.

2. If it is not feasible to make such persons parties, the court should determine whether in equity and good conscience the action should proceed among the parties or should be dismissed, based on several factors: In the person's absence will the judgment be prejudicial to him? By the shaping of relief or other measures can the prejudice be minimized?

Will the judgment in the person's absence be adequate? Will plaintiff have an adequate remedy if the action is dismissed for non-joinder?[67]

3. A person may be added as a party at any stage of the action on motion (or on the court's initiative under Rules 19 or 21); joinder questions should be made with reasonable promptness, but decision may properly be deferred if adequate information is not available at the time.

4. Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it; but the court can make a legally binding adjudication only between the parties actually joined in the action. Although such adjudication may adversely affect the absent person as a practical matter, such factor does not negate the power to adjudicate as between the parties who have been joined.

5. As Rule 19 is equitable not jurisdictional in character, the court should not dismiss for nonjoinder when circumstances make it inequitable to do so; for the court always has the jurisdiction to bind the parties already present.

---

[67] The word "indispensable" is used in Rule 19(b) in a conclusory sense: a person is regarded as indispensable when upon consideration of the various factors, it is determined that in his absence it would be preferable to dismiss the action rather than to retain it. See Notes of Advisory Committee to 1966 Amendment; *Provident Bank* v. *Patterson*, 390 U.S. 108, 118-119 (1968). Thus, a court may "proceed to an adjudicaiton without the presence of a necessary party but cannot do so if the absent party is indispensable." 3A *Moore's Federal Practice* ¶19.107[3], p. 2254 (2d Ed. 1972).

In *Provident Bank* v. *Patterson*, 390 U.S. 102 (1968) this Court fully supported the Advisory Committee's analysis and statement of dispositive principles in the "context of a particular litigation." 390 U.S. at 118.

In applying these principles in the context of this particular litigation, we respectfully submit that the District Court's deferral of ruling on the joinder issue while proceeding with the action was entirely proper; that, in any event, any final adjudication made by the District Court would and should be binding on at least the original State and Detroit defendants even in the absence of all other parties; and finally, that if the District Court made a mistake with respect to joinder of parties, such mistake should be cured in the proceedings already under way on the remand. These conclusions are supported by the following factors:

1. This action commenced without knowledge of the necessary extent and nature of relief. Throughout the hearings on violation and then remedy, adequate information on the nature and extent of needed relief remained unavailable; as no actual plan has ever been submitted, there has been no basis for knowing what school districts might be involved and to what extent protection of any of their interests cognizable under Rule 19 might be impeded. Intervening defendants Magdowski, et al., did file a motion to join all 86 school districts in the tri-county area. (Ia 19) On three separate occasions the District Court expressly deferred ruling on this motion because of the lack of adequate information on which to make a determination: "Considered as a plan for desegregation, the motion is lacking in specificity and is stated in the broadest general terms." (J. 39a) (J. 44a; Ia 204). Under Rule 19 such deferral of decision on the joinder issue is proper until adequate information is available for a decision. Due

to State defendants' default in failing to submit an actual plan of desegregation, such deferral was entirely proper at least until after the District Court's findings and rulings of June 14, 1972, on the tentative desegregation area and action required in the development of a plan. Arguably, at that point in time the District Court for the first time should have made a decision under Rule 19 on the joinder of absent parties. But the propriety of the District Judge's deferral of ruling through that time is especially clear in light of his obvious desire to allow interested parties to be heard despite the practical difficulties.[58]

2. Absent some affirmative obstruction by absent parties, the State defendants had sufficient authority to implement any injunction of the court even if it required action beyond the geographic limits of the Detroit School District. Hence, as noted above, the parties already before the Court could accord complete relief. *See, e.g., Hoots* v. *Commonwealth of Pennsylvania*, 359 F. Supp. 807, 821-2 (W.D. Penn. 1973); *United States* v. *Texas Educ. Agency, supra; Husbands* v. *Commonwealth of Pennsylvania*, 359 F. Supp. 925, 937 (E. D. Pa. 1973). In the event any such obstruction or other necessity requires joinder of additional parties either to accord or maintain complete relief, such joinder could be accomplished pursuant to either Rule 19 or Rule 21. *See, e.g., Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 234 (1964).[59]

---

[58] The failure of the Court of Appeals to examine the propriety of the District Court's reasons for deferring decision on the joinder issue is inexplicable.

[59] In many school desegregation actions such absent parties are joined long after the prior adjudication and orders among existing parties. *See, e.g., United States* v. *Georgia*, 466 F.2d 197 (5th Cir. 1972); *Robinson* v. *Shelby County Bd. of Education*, 330 F. Supp. 837, 844-45 (W.D. Tenn. 1971), *aff'd*, 467 F.2d 1187 (6th Cir. 1972). For example, many city councils or finance

3. Due to the nature of relief contemplated by the lower courts, and particularly deferral of any reorganization to the legislature with interim relief to be accomplished by contracts and pupil transfers between existing districts pursuant to state law, the suburban school districts have no interest cognizable by Rule 19 to be protected in this action. As local school districts are subject to the absolute control of the legislature and action by the State defendants to conform to the requirements of law, they have no legal interest requiring protection under Rule 19. *Hoots* v. *Commonwealth of Pennsylvania, supra; Evans* v. *Buchanan*, 256 F.2d 688 (3rd Cir. 1958); *Husbands* v. *Commonwealth of Pennsylvania*, 359 F. Supp. 925, 937 (E.D. Pa. 1973); also *cf. Hunter* v. *Pittsburgh*, 207 U.S. 161, 178-9 (1907); *Trenton* v. *New Jersey*, 262 U.S. 182 (1923); *Att'y General* v. *Lowrey*, 131 Mich. 639 (1902), *aff'd*, 199 U.S. 232, 239-240 (1905). This is especially true in view of the fact that the conduct of suburban school districts was never put in issue by plaintiffs. *See, e.g., Griffin* v. *State Board of Education*, 239 F. Supp. 560, 566 (E.D. Va. 1965).

4. Assuming *arguendo* that school districts have had some interest cognizable under Rule 19 in the litigation to date, their ability to protect such interest has not as a practical matter been impaired or impeded by the prior proceedings in the District Court. At every stage in these proceedings, some party has adequately protected the in-

---

commissions have been added recently (to provide necessary desegregation funding) to cases already hoary with age. If the novel procedural suggestions of amici and petitioners in this case are accepted, failure to join such necessary parties at the onset of the action requires dismissal of the action in each of these cases. *But see, e.g., Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Aaron* v. *Cooper*, 156 F. Supp. 220 (E.D. Ark. 1957), *aff'd sub nom., Faubus* v. *United States*, 254 F.2d 797 (8th Cir. 1958).

terests of all suburban districts possibly at issue. At the violation hearing, Detroit and State defendants actively contested the proof of violation as to its nature, extent, and continuing effects. Thereafter, State defendants opposed any desegregation beyond the limits of the DSD; so too, did the suburban parent and school district intervenors. Thus whatever relevant interests absent suburban school districts could have asserted at each stage of the proceedings were asserted and adequately represented by at least one party already defendant. *Cf. New Jersey* v. *New York*, 345 U.S. 369, 372-3 (1953); *Kentucky* v. *Indiana*, 281 U.S. 163 (1930).

5. The District Court evidenced its clear desire to permit all interested parties to be heard:

> . . . I do not propose to stop the voice of anybody who is apt to be affected by the plan. So this is a matter of mechanics. When the time comes that action has to be taken in that regard we will give it further thought and make a decision that we believe will be a fair one and yet will permit us to proceed with some dispatch in achieving some remedial effects. . . . (J. 44a).

Subsequently, the District Court permitted suburban school districts, as well as a group of suburban parents, to participate as parties in the hearings.

6. Assuming *arguendo* that the District Court made a mistake in not joining absent school districts, there can be *no* question in equity and good conscience that this action could properly proceed to a final adjudication among those who were parties on September 27, 1971.[40] Rule 19(b) sets

---

[40] Professors Wright and Miller suggest that actions against public officials often raise questions concerning the joinder of other officials. They approvingly note the trend in recent cases

out four factors to be considered in determining whether the action should be dismissed because of the absence of a party or go forward without him. The first three factors have already been analyzed: in this case the judgment as shaped is not prejudicial to any interest of a suburban district cognizable by Rule 19 and relief can be granted to plaintiffs in the absence of suburban school districts. The fourth factor, however, compels the conclusion that the essence of equity would require that this action *not* be dismissed but rather continued among those already parties.

For if the action is dismissed or the lower court rulings and decisions vacated for non-joinder under Rule 19, plaintiffs will most assuredly *not* have an adequate remedy for the long-standing violation already found; further delay in the disestablishment of the state-imposed system of segregation will mean, inevitably, further denial of plaintiff children's constitutional rights and will irreparably harm them "in a way unlikely ever to be undone." *Brown I*, 347 U.S. at 494. Twenty years after *Brown*, the constitutional command to end state-imposed segregation requires continuation of this action at least among those already parties. After several years of trial proceedings among adversary parties with the power to grant all relief necessary and the showing of a pervasive constitutional violation, it would be unconscionable for plaintiffs to be told that all that has gone before is naught. We respectfully suggest that any other ruling will have devastating consequences upon the ability of litigants and district courts everywhere fairly and promptly to hear

---

to determine the joinder issue based simply on whether effective relief can be accorded on the basis of the parties already before the court, even where joinder of the absent officials is feasible. *Federal Practice and Procedure*, Sec. 1617 (1972).

constitutional claims and, upon showing, to provide prompt and adequate relief among the parties present.[61]

B. *Petitioners and Amici School Districts Have Not Been Denied Any Procedural Rights Guaranteed to Them by the Fifth and Fourteenth Amendments.*

At the outset, we reiterate that any potential procedural error can be cured by the proceedings on remand long

---

[61] On remand from the Court of Appeals, plaintiffs acquiesced in the thrust of that court's direction, not out of agreement but out of a desire to get on with the proceedings. Upon plaintiffs' motion, the District Court joined as parties all 86 school districts, their members and superintendents, in the tri-county area pursuant to Rules 19 and 21. (Ia 287-290; Ia 300-302). At the same time plaintiffs filed an amended complaint to conform to the evidence (Ia 300 et seq.); no allegations were made about the conduct of suburban school districts. As noted, in the proceedings on that remand, the added parties will have an opportunity to present all relevant evidence, including any as to violation, upon a proper showing.

The joinder decision of the Court of Appeals apparently turned on its belief that suburban school districts had such relevant information and particular interest in any relief extending beyond the DSD that they must be joined at hearings which address such multi-district relief. Whatever the merits of the joinder ruling of the Court of Appeals, generally such a belief properly distinguishes the comparative lack of information and interest of the suburban districts with respect to Detroit-only considerations. It also represents a proper recognition that suburban school districts were not and are not "indispensable" to the prior proceedings. In plaintiffs' view of Rule 19, however, the District Court will have joined these suburban parties and allowed them to be heard in the exercise of its discretion not because required to do so by Rule 19 and traditional equity principles. In that regard, if this Court directs, plaintiffs would be entirely amenable to proceeding with the action below in the absence of suburban school districts and their board members and superintendents; plaintiffs submit that relief can be accorded by State and Detroit defendants, with additional parties joined only (1) when and if they affirmatively obstruct implementation of any plan eventually ordered by the District Court, *cf.* *Griffin* v. *County School Board*, 377 U.S. 218 (1964); or (2) when and if the interests in efficient administration of justice require, *cf.* *United States* v. *Georgia*, 466 F.2d 197, 200 (5th Cir. 1972).

before the District Court has ordered any suburban school district to do anything: on remand they will have a meaningful opportunity at a meaningful time to challenge any of the previous findings of the District Court by presentation of relevant evidence, including by cross-examination of witnesses who have previously testified. This was precisely the procedure followed in *Bradley* v. *Richmond*, 51 F.R.D. 139 (E.D. Va. 1970), which petitioners cited in the Court of Appeals as the proper procedure to follow. Moreover, the Richmond litigation started *ten* years before any suburban school district was joined. Equally dispositive, the District Court has treated these parties with fundamental fairness in the context of the nature of the proceedings below to this point (See Counterstatement, *supra*). Finally, the equitable considerations underlying Rule 19 apply with equal force to the fundamental fairness of procedures followed below. (See Argument, *supra*).

Petitioners and amici school districts, however, have failed in the circumstances of this case even to show how they fall within the guarantees of any constitutional provision.

1. The Fourteenth Amendment is clearly inapposite here; it speaks only to procedural deprivation resulting from "state action," not the prior proceedings and potential future orders of a federal district court. U.S. Const. Amend. 14.

2. The Fifth Amendment, which does speak to the exercise of federal rather than state power, reads in pertinent part:

> No person shall . . . be deprived of life, liberty or property without due process of law. U.S. Const. Amend. 5.

School districts in the context of this litigation have no interest protected by this provision for two distinct reasons. First, school districts should not be considered "persons" under the Fifth Amendment. The entire Amendment literally reads as if to protect natural persons[42] or wholly private interests from the excesses of federal public power. Thus in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966), this Court held:

> The word "person" in the context of the due process clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court. Nor does a State have standing as the parent of its citizens to invoke this constitutional provision against the Federal Government, the ultimate *parens patriae* of every American citizen.

With respect to the Federal Government and federal district courts, precisely the same statements can be made about the various political subdivisions of the States, which after all are wholly creatures of the State and subject to its will absolutely, without protection from the State's caprice under either the Fourteenth Amendment or the Contracts Clause. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178-

---

[42] Whether a municipal corporation is a "person" varies with its use. *Compare City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973) (not a "person" for 42 U.S.C. §1983) *with Santa Clara County* v. *Southern R.R. Co.*, 118 U.S. 394 (1886) (a "person" under the Fourteenth Amendment). (Justices Douglas and Black have expressed their dissent from the view that "persons" in the Fourteenth Amendment includes other than natural persons. *Conn. Gen. Life Ins.* v. *Johnson*, 303 U.S. 77, 83-90 (1938); *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 576-581 (1949)). And under Michigan law, school districts lack even the status of municipal corporations, as mere "auxillaries" of the State, *see Att'y General* v. *Lowrey*, 131 Mich. 639 (1902).

179 (1907); *Trenton* v. *N.J.*, 262 U.S. 182, 186 (1923). This is not to suggest that federal district courts may act arbitrarily toward States or their political subdivisions,[43] but only that the Fifth Amendment provides no protection. Rather, the sources of protection for a school district and a State from arbitrary abuse at the hands of a district court are the Federal Rules of Civil Procedure and considerations of equity.

Second, even assuming *arguendo* that the school districts are "persons" under the Fifth Amendment and protected thereby from any excesses of federal judicial power, the school districts have no interest cognizable by the Fifth Amendment which has been threatened by the proceedings below. To draw the analogy from the Fourteenth Amendment procedural protection of corporations from arbitrary state action, school districts could assert at most only their "proprietary" interests in "property," if any;[44] for "life" and "liberty" remain attributes only of natural persons. *See, e.g., Hague* v. *C.I.O.*, 307 U.S. 496, 527 (1939); (separate opinion, Stone, J.); *Western Turf Association* v.

---

[43] We note in this regard that this Court in several of its original jurisdiction cases has held that the interests of a political subdivision of a State are adequately represented by the State and has refused to permit intervention by the political subdivision. *See, e.g., New Jersey* v. *New York*, 345 U.S. 369 (1953). We fail to see, therefore, absent a showing of inadequate representation, why the interests of the petitioners and amici political subdivisions here have not been served similarly by petitioner State defendants.

[44] And as noted *supra*, note 62, under Michigan law school districts may not even possess the attributes, including proprietary interests, of municipal corporations. Based on that state law, the State Attorney General has ruled (1) that funds expended by local districts are the funds of the State and (2) that the school buildings and lands of local districts are the property of the State. Attorney General Opinions No. 406 (May 28, 1947) and No. 4371. Compare *Essex Public Road Board* v. *Skinkle*, 140 U.S. 334, 339-340 (1891); *City of New Orleans* v. *New Orleans Water Works Co.*, 142 U.S. 79, 92 (1891).

Greenberg, 204 U.S. 359, 363 (1907); *Northwestern Nat'l Life Ins. Co.* v. *Riggs*, 203 U.S. 243 (1906). In this case the relief contemplated has been shaped to avoid any deprivation of the property interests of any school district.

Thus the lower courts, in the exercise of their discretion to date, have provided suburban school districts with more procedure than is required by Rule 19 or the Constitution of the United States. We urge that petitioners' novel theories of procedure, both with respect to Rule 19 and the Constitution, be rejected by this Court.

CONCLUSION

Since *Brown*, and in direct violation of their constitutional rights as therein declared, black children in Detroit have been intentionally confined, by various *de jure* devices, to an expanding core of black schools always separated by a line from immediately surrounding white schools. Because of the continuing nature of that constitutional violation, reflected in the expansion of the state-imposed core of black schools, petitioners seek to interpose as the new dividing line the existing boundaries of the Detroit School District. If that dividing line is permitted to stand without breach to perpetuate the basic dual structure, the intentional confinement of black children in schools separate from whites will continue for the foreseeable future. The violation of constitutional rights will continue without remedy. Such a result is not only to repeal *Brown* and to return these children to *Plessy*, but also to undermine the system of constitutional government in the United States. For as stated by Chief Justice Marshall, in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803),

> The government of the United States has been emphatically termed a government of laws and not of

men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

WHEREFORE Respondents Ronald Bradley, et al., respectfully pray that this Court affirm the judgment below.

Respectfully submitted,

NATHANIEL R. JONES
1790 Broadway
New York, New York 10019

LOUIS R. LUCAS
WILLIAM E. CALDWELL
525 Commerce Title Bldg.
Memphis, Tennessee 38103

PAUL R. DIMOND
210 East Huron Street
Ann Arbor, Michigan 48108

J. HAROLD FLANNERY
ROBERT PRESSMAN
Larsen Hall, Appian Way
Cambridge, Mass. 02138

JACK GREENBERG
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

ELLIOTT HALL
950 Guardian Building
Detroit, Michigan 48226

Attorneys for Respondents
Ronald Bradley, et al.,
Plaintiffs Below

Note on Form of Record Citations

Throughout this brief, the following forms of citation have been employed:

"J. —" refers to petitioners' Joint Appendix to their certiorari petitions, containing the opinions below.

Citations preceded by a roman numeral, e.g., "Ia —," "IVa —," refer to volumes of the Single Appendix filed in this Court on these consolidated cases.

Portions of the transcript which form part of the record herein, but which were not included within the Single Appendix, are cited as follows:

—Citations to the transcript of the "violation hearings" which took place in the summer of 1971 as "R. —."

—Citations to the transcripts of other hearings are preceded by appropriate identification of the hearing to which reference is made, e.g., "8/29/70 preliminary hearings Tr. —." See generally, Counterstatement of the case, *supra*.

Exhibits introduced at the various hearings are identified as follows:

—Exhibits at the 1971 "violation" hearings as "P.X. —" [plaintiffs'], "D.X. —" [defendants'], etc.

—Exhibits at the hearings on proposed metropolitan plans as "Ex. —," "P.M. —" [plaintiffs' metropolitan], etc.

Other record citations are largely self-explanatory. We also note that the text of *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973), is cited to Lawyers' Edition, 2d Series throughout the body of this Brief since it was reported in United States Reports advance sheets only as this Brief was being submitted to the printer.